TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 189.

JOSEPH HOBSON AND JOSÉ M. HURTADO, PLAINTIFFS IN ERROR,

vs.

DANIEL W. LORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 12, 1874.

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1 Circuit court of the United States for the southern district of New York.

Pleas before the judge of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the court-rooms in the city of New York, of the October term, 1873, to wit, on the 5th day of November, A. D. 1873.

Witness the honorable Nathaniel Shipman, judge of the said court.

Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 13th day of January, 1872, in the October term, 1872, of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the court-rooms in the city of New York, in the said district, before the judge of the said court, came Daniel W. Lord, by Francis C. Barlow, his attorney, and brought then and there into the said court, before the judge thereof, his certain declaration against Joseph Hobson and José M. Hurtado, of a plea of trespass on the case on promises; which said declaration follows these words, that is to say—

SOUTHERN DISTRICT OF NEW YORK, *ss:*

2 Daniel W. Lord, the above-named plaintiff, who is a citizen of the State of Massachusetts, and resides at Malden, in said State, complains of Joseph Hobson, who is a citizen of the State of New York, José M. Hurtado, who is an alien, and a citizen of the Republic of Peru, being in custody, &c., of a plea of trespass on the case on promises, for that whereas, before and at the time of the happening of the losses hereinafter mentioned, he was the owner of a certain ship called the Lincoln, the same being of great value, to wit, of the value of twenty-one thousand dollars, ($21,000;) and that on or about the day of , 1870, while said vessel was on a certain voyage from the Guanape Island to Hampton Roads for orders, with certain goods on board of great value, to wit, of the value of seventy-seven thousand eight hundred and ninety-three dollars, ($77,893,) net, mentioned in a bill of lading, a copy of which is hereto annexed, marked "A," and made a part of this declaration, and while proceeding toward Callao, for the purpose of obtaining a clearance, said vessel was damaged by perils of the seas; that said ship thereupon proceeded to Callao, and came to anchor at the anchorage-ground at which vessels touching at Callao for a clearance and for orders are accustomed to come to anchor.

That said vessel was found to be so damaged by said perils as aforesaid that it became necessary, for the good of all concerned, and
3 in order to enable said voyage to be prosecuted, to remove said cargo, and to repair said vessel, and to accomplish this it became necessary to remove said vessel from said anchorage-ground to a place where said cargo could be discharged; that said cargo was thereupon discharged, and thereafter said vessel was removed to another place, where she was taken into dock and repaired; that after said vessel was repaired said cargo was reladen; and that all said acts were done for the good of all concerned, and were necessary in order to enable said voyage to be prosecuted, and that great and necessary expenses were incurred by the plaintiff in the premises, to wit, to the amount of twenty-two thousand eighty-seven dollars and eighty-eight cents, ($22,087.88.)

And the plaintiff further says that from the time that said vessel was

removed from the said anchorage-ground until the time that said vessel was enabled to depart from said port of Callao, upon said voyage, the plaintiff was obliged to pay the wages and maintenance of the master and crew of the said vessel, to wit, to the amount of five thousand and eleven dollars and ten cents, ($5,011.10,) and that by said expenditures said voyage was prosecuted to its termination; and the said goods arrived in said ship safely at the port of destination, to wit, the port of New York, into the possession of the defendants, who then com-
4 posed a firm or copartnership trading under the firm-name and style of Hobson, Hurtado & Co., who are and were the consignees of said cargo, as appears from the said bill of lading, hereto annexed.

And the plaintiff says that by reason of the premises the said goods became liable to contribute to the said expenses as aforesaid in a general average, to wit, to the amount of nineteen thousand dollars ($19,000;) and thereupon the defendants, under and in their said firm-name, did, on a certain day, namely, the 11th day of May, 1871, by a paper-writing hereto annexed, and marked "B," agree to pay to the plaintiff whatsoever sums should be found to be due in general average upon the said cargo by them received, such payment to be made whenever and so soon as the average should be adjusted conformably to law and the usages of the port of New York; and that thereupon, and in consideration thereof, the plaintiff did deliver said cargo to the defendants, who received and accepted the same.

And the plaintiff says that by virtue of the premises the defendants are liable to the plaintiff to contribute toward the losses and expenses aforesaid in a general average a large sum of money, which the defendants, though often requested, have failed and neglected to pay to the plaintiff, to the damage of the plaintiff, as he says, the sum of twenty-five thousand dollars, ($25,000.)

5 And the plaintiff says that before and at the time of the happening of the losses hereinafter mentioned he was the owner of a certain ship called the Lincoln, and that through his agent, the master of said vessel, on January 15, 1870, he entered into a certain charter-party with the defendants, then being the company or members of the company styled "Compania Consignataria de Guano en los Estados Unidas de America," one of the originals of which charter-party is hereto annexed, marked "C," and made a part of this declaration; that in said charter-party it was provided that said vessel should proceed from Callao to the Chincha or Guanape Islands, at charterer's option, there to take a cargo of guano, and that after completing her loading of guano she should return to Callao to take her final clearance, or should sail directly from the islands, according to charterer's orders; that said vessel should, after completing her loading, proceed in the manner aforesaid to Hampton Roads for orders to discharge in any safe sea or river port in the United States not south of Norfolk, Virginia, nor north of Cape Ann, there to discharge said cargo of guano; that in accordance with said charter-party said vessel proceeded from said Callao to the Guanape Islands, where she took in a cargo of guano, and while on the voyage therefrom to said Hampton Roads, in accordance with said charter-party, and while proceeding toward Callao for the purpose of ob-
6 taining a clearance, in accordance with said charter-party, with the said cargo on board, said vessel was damaged by perils of the seas; that said ship thereupon proceeded to Callao and came to anchor at the anchorage-ground at which vessels touching at Callao for a clearance and for orders are accustomed to come to anchor; that said vessel was found to be so damaged by said perils as aforesaid that it became neces-

sary, for the good of all concerned, and in order to enable said voyage to be prosecuted, to remove the said cargo, and to repair said vessel, and in order to accomplish this it became necessary to remove said vessel from said anchorage-ground to a place where said cargo could be discharged; that said cargo was thereupon discharged, and thereafter said vessel was removed to another place, where she was taken into dock and repaired; that after said vessel was repaired said cargo was reladen, and that great and necessary expenses were incurred by me, plaintiff, in the premises, to wit, to the amount of twenty-two thousand and eighty-seven dollars and eighty-eight cents, ($22,087.88.)

And the plaintiff further says that from the time that said vessel was removed from the said anchorage-ground until the time that said vessel was enabled to depart from said port of Callao upon said voyage
7 the plaintiff was obliged to pay the wages and maintenance of the master and crew of the said vessel, to wit, to the amount of five thousand and eleven dollars and ten cents, ($5,011.10,) and that all said acts were done and expenses incurred for the good of all concerned, and were necessary in order to enable said voyage to be prosecuted.

And the plaintiff says that at said Callao the defendants and the master entered into a contract by bill of lading, a copy of which is hereto annexed, marked "A," whereby the master contracted to carry and convey in said ship said cargo from said Callao to the port to be designated, to wit, the port of New York.

And the plaintiff says that by said expenditures the said voyage was prosecuted to its termination, and the said goods being of great value, to wit, to the amount of seventy-seven thousand eight hundred and ninety-three dollars, ($77,893,) net, arrived in said ship safely at the port of destination, to wit, the port of New York, and were duly delivered to the consignees of said cargo as by said bill of lading.

And the plaintiff says that by reason of the premises the defendants became liable to contribute to the said losses, damages, and expenses in a general average a large sum of money, to wit, the sum of nineteen thousand dollars, ($19,000,) which the defendants, though often
8 requested, have failed and neglected to pay to the plaintiff, to the damage of the plaintiff, as he says, the sum of twenty-five thousand dollars, ($25,000,) and therefore the plaintiff brings this suit.

"A.

Shipped in good order and condition by the Compania Consignataria de Guano en los Estados Unidas de America, acting agents for the Peruvian government at the Guanape Islands, in and upon the good ship or vessel called the Lincoln, now lying at the port of Callao, and bound for Hampton Roads, whereof Homans is master for this present voyage, a full and complete cargo of guano, measuring one thousand one hundred ninety-two register tons, or thereabouts, to be delivered in the like good order and good condition, at such port as according to charter-party the vessel may be ordered to discharge, (the damages and accidents of the seas and navigation, of whatsoever nature or kind, excepted,) unto Messrs. Hobson, Hurtado & Co., in New York, or to their order, they paying freight for the said guano as per charter-party. For the faithful performance whereof the said master was bound and obligated, the said ship, freight, tackles, apparel, etc., according to commercial law and practice, having affirmed to seven bills of lading, all of this tenor and date, one of which being accomplished the rest to stand void.

1,192 tons register.

Lima, 29 December, 1870.

9 GEORGE W. HOMANS.

1,800 bags, the balance in bulk.
The ship draws aft 20 ft. 3 in.
" " " f'w'd 20 ft. " "
N. B.—All the guano on board belongs exclusively to charterers.

(Written across the face:)
Cancelled.
Received seventeen hundred and sixty-seven $\frac{2034}{2240}$ tons, net, guano, of which about 142 tons are damaged.

HOBSON, HURTADO & CO.

"B."

John S. Tyler, notary public and insurance-broker, 28 State street, Boston.

Whereas the ship Lincoln, G. W. Homans, master, on a voyage from Guanape Islands for Hampton Roads, for orders, with a cargo of guano, whilst proceeding towards Callao to clear, came in collision with another vessel, and sustained damages which made it necessary to discharge cargo to refit, whereby sundry expenses and charges have arisen, and various sacrifices have been made which are the subject of a general average, and should be borne by the property at risk as a common charge in contribution:

Now, be it known, that we, the undersigned consignees, owners or insurers of the cargo of the said ship Lincoln, in consideration of the premises, and in further consideration of the delivery to us of our several parcels of merchandize, have agreed, and do hereby severally promise and agree, each for himself, and not one for another, that we will pay to Dan'l W. Lord, owner of said ship Lincoln, or to his authorized agent, whatsoever sums may be found due from us respectively, for our respective proportions of such expenses, charges, and sacrifices as have arisen in consequence of the disaster aforesaid; such payment to be made whenever and so soon as the average shall be adjusted conformably to law and the usages of the port of New York.

Dated at New York the 11th day of May, 1870.

Names.	Description of articles.	Net value, deducting freight, duty, and other charges.
Hobson, Hurtado & Co.	1,192 tons guano reg'r.	

"C."—*Charter-party.*

It is hereby mutually agreed between Captain G. W. Homans, agent for owners of the Salvadorian ship Lincoln, 1,192 tons, or thereabouts, register-measurement, now in Callao, on the one part, and the "Compania Consignataria de Guano en los Estados Unidas de America," acting agents for the Peruvian government, on the other part, as follows:

That the said vessel being tight, staunch, and strong, well-conditioned, and in every way fitted for the voyage, shall, with all convenient dispatch, be inspected by the Peruvian government surveyors, and if not reported in such order and condition as aforesaid, the necessary repairs shall be made at ship's expense. The vessel being approved of by said government surveyors, shall forthwith proceed to the Chincha or Guanape Islands, at charterer's option, there to take a cargo of gua lo, having

previously discharged any stones, sand, or earthy substances on board as ballast or otherwise.

After completing her loading of guano the vessel to return to Callao, to take her final clearance, or shall sail directly from the islands, according to chartered orders.

The ship shall convey to the port of loading any specie that may be required there by the charterers or their agents, and any tools, (sent alongside while the vessel is at anchor in Callao,) free of freight, and shall supply, free of charge, on shore, at the guano ports, any water that may be required by the charterers' agents, not exceeding 12 tons. Such sacks as shall be supplied by the charterers at Callao on shore shall be conveyed on board by the ship's boats and to the place for loading on the vessel free of charge, and there filled with guano by the owners, and the mouths of the sacks sewn up at owners' expense, the charterers providing twine, and the sacks shall be used for lining the vessel.

Should political or other circumstances prevent there being sufficient laborers at the loading places, the captain shall send on shore a part of his crew, (as many as he can conveniently spare,) to load the cargo, they receiving the usual laborer's daily pay while so employed.

At the place for loading, the vessel to be placed under the shoots to load, or, at the option of the charterers, the cargo to be placed in the ship's or charterers' boats, and in them conveyed on board at ship's

12 expense and shipper's risk.

The guano shall be stowed so that a clear space may be left round the vessel under the deck for the purpose of examining the cargo, and removing any water which may have been shipped; and every convenient opportunity shall be taken to examine the guano, and all possible means used by the captain to prevent and lessen damage.

The quantity of guano to be shipped shall not exceed such an amount as the ship can safely and conveniently carry, according to the decision of the government surveyors, and if a greater quantity be shipped, and loss should be sustained by the charterers upon the guano, and whether the same be in the nature of a particular or general average or of charge upon the guano, or otherwise, all such loss shall be deemed to have arisen from the ship having been overloaded, whether it be the fact or not, and the amount of such loss shall be paid by the said owners to the said charterers; but in the case of loss by particular average, the owners shall only pay such amount as may exceed three per cent. upon the net value of the limited cargo of guano hereby agreed to be shipped.

The owners to find necessary dunnage, and to be responsible for damage by negligence, also for damage arising from side-lights or ports.

No guano or other dead weight shall be received on board, except from the charterers or their agents.

13 Ten working days for each one hundred register-tons to be allowed to the charterers at the loading ports for placing cargo on board of the ship. Nevertheless, in no case shall the charterers have less than thirty nor more than eighty working days in all; said days to commence from the day the master gives notice in writing of being ready to receive and take on board, and to cease when he gives notice that he is to receive no more cargo; and ten days to be allowed to the owners at the port of clearance for taking in light freight and specie; and all days of demurrage over and above the already specified to be paid for at the rate of eleven pounds eighteen shillings sterling (£11 18s.) per day from the party delinquent to the party observant.

The owners of the vessel to pay all port-charges. The said vessel shall, after completing her loading, as before mentioned, proceed to

Hampton Roads, where she is to remain until return of post to receive orders from charterers in New York, or their agents, to discharge in any safe sea or river port in the United States, not south of Norfolk, Virginia, nor north of Cape Ann, and there, according to bills of lading, deliver the cargo which is to be discharged and taken from alongside, as fast as the custom of the port to which she may be ordered will permit, the consignee having the liberty of naming the dock or wharf at which the cargo is to landed. Should the consignees require the cargo to be put into bags at their expense before discharged from the vessel, the captain is not to object thereto; the captain to sign bills of lading without prejudice to this charter-party.

The freight to be paid, as under, at the rate of fifteen dollars fifty cents ($15.50) U. S. gold coin, less a commission of two and one-half of one (2½) per cent. in full per ton of twenty cwt., (2,240 lbs.,) net, of guano, United States custom-house weight. In calculating the freight the proper percentage for water on all that turns out damaged, as well as the weight of bags used for lining the vessel, shall be deducted, and no freight shall be paid on stones or other substances than guano.

The master to be supplied at Callao, or at the port of clearance, (after the vessel is loaded and in proper order to proceed on her voyage,) with a sum not exceeding six thousand dollars Peruvian currency, in case needed, which, together with ten per cent. premium on the same, and all cost of insurance on such premium and advance, is to be considered in part payment of the freight; the captain's receipt to be binding on the owners.

And it is hereby expressly agreed that the receipt of the master for any such sum or sums of money as shall be supplied or advanced to him by the charterers as aforesaid shall be conclusive and binding upon the owners, and they shall thereby be prevented, as between them and the charterers, from inquiring into the necessity for or the appropriation of the sum of money which in such receipt or receipts shall be acknowledged to have been received; and all contributions to general average and losses which, if any, shall became payable in respect of any such advances as aforesaid, shall be borne and paid by the owners.

Six thousand dollars U. S. gold coin, if required, to be paid to the ship on arrival at the port of discharge on account of freight, five (5) per cent. on said amount, or on such part thereof as may be paid and received by the master or owners, being deducted for the benefit of the charterers, and the balance of the freight to be paid on the true, right, and full delivery of the cargo by the chaterers' agents in New York, acceptance to the owner's draft at three months' date, or in cash less the usual discount, at the option of said charterers' agents.

The captain or owners to grant a receipt in quadruplicate for the full amount of freight when settled, stating also the number of tons of guano delivered.

The charterers are hereby authorized to retain and deduct from the freight all such damages and sums of money, as well liquidated as unliquidated, to which the owners shall become liable to the charterers by virtue of or in anywise in relation to the charter-party, it being the intention of the parties that all claims and demands, of whatsoever nature, which shall accrue to the said charterers, shall be treated as payments made by the charterers on account of freight.

The ship to be consigned to charterers' agents at New York, or their agents at the port of discharge, who will charge usual commissions. And if, by any unforeseen event, the vessel should enter any port or ports

on the Pacific or Atlantic coast, or in any of its islands, to repair damages, etc., the captain shall consign her to the agent or agents of the "Compañia Consignataria de Guano en los Estados Unidos de America," (paying usual commissions,) who shall perform all business belonging to the ship and cargo. Said agents are—

In Valparaiso, Ruiz y Pardo,
" Talcahuano,
" Montevideo,
" Rio Janeiro,
" St. Thomas, and in other ports the parties authorized by the said company, or the agents in the ports above mentioned.

The ship shall not, either when going out of or on her return to Callao, take the passage called the "Boguernon."

The ship shall, after completing her cargo, be inspected at the port of clearance, at her own expense, by a person appointed by the charterers and by government surveyors, in order to ascertain again her sound and seaworthy condition.

Penalty for non-performance of this charter-party, ten thousand
17 dollars U. S. gold coin, which amount is fixed as indemnity for damage caused by the party delinquent to the party observant. Political or other extraordinary and unforeseen circumstances, the acts of God, enemies, fire, and all and every other dangers of the seas, rivers, and navigation, during the said voyage, always excepted.

Signed in Lima in six parts, all of this same tenor, dated the 15th day of January, 1870.

On behalf of the "Comp. Consig. de Guano en los E. E. U. S."

GEO. SMITH, witness to the signature of—

J. M. HURTADO.

On behalf of the owners of the ship.

S. CROSBY, witness to the signature of—

GEORGE W. HOMANS.

And the said Joseph Hobson and José M. Hurtado, defendants in this suit, by Prichard, Choate, and Smith, their attorneys, come and defend the wrong, and injury, when, &c., and say that they did not undertake or promise in manner and form as the said Daniel W. Lord hath thereof complained against them, and of this they put themselves upon the country, &c.

And the said plaintiff, Daniel W. Lord, as to the plea of the said defendants, by them above pleaded, and whereof they have put themselves upon the country, doth the like, &c. Therefore, the issue above joined is ordered by the said court to be tried at the term of the said court appointed to be held at the city of New York on the 3d Monday of October, 1873. And the said parties thereupon stipulate in writ-
18 ing that a jury be waived, and that the court should find specially upon the facts, pursuant to the statute in that case made and provided.

And now on this day, to wit, the 19th day of February, 1874, being as yet of the said October term, before the said judge, at the United States court-rooms in the city of New York, came the said Daniel W. Lord, by his attorney aforesaid, and the above-named defendants, by their attorneys as aforesaid, and the said judge before whom the said issue was tried has sent hither his record had before him, in these words, to wit:

Afterwards, that is to say, on the day and at the place last before mentioned, before the judge of the said court, came as well the above-named plaintiff, as the above-named defendants, by their respective attorneys aforesaid, and the said issues of fact having been tried by the court pursuant to the stipulation aforesaid, the court makes and files the following special findings upon the facts:

The plaintiff, who is a citizen of the State of Massachusetts, and resides at Malden in said State, before and at the time of the happening of the losses hereinafter mentioned, was the owner of the ship Lincoln, and continued to be her owner until her arrival at the port of New York, with the cargo of guano hereinafter mentioned, and until after her departure therefrom; the defendant, Joseph Hobson, is a citizen of the State of New York, and the defendant, J. M. Hurtado, is an alien,
19 and a citizen of the republic of Columbia.

On January 15, 1870, while said ship was lying at Callao, the plaintiff through his agent, the master of said ship, entered into a charter-party, a copy of which is annexed to the declaration, marked "C," and at the same time and place the said master signed and delivered to the charterers a paper of which a copy is hereto annexed marked "A;" in accordance with said charter-party she proceeded from Callao to the Guanape Islands, where she took in a cargo of guano; and while proceeding, in accordance with said charter-party, towards Callao, under orders from the charterers received at the islands, for the purpose of obtaining a clearance and final orders there, with the cargo of guano on board, the master of the said vessel intending to proceed therefrom to Hampton Roads, in accordance with the charter-party, said vessel became damaged while on that passage from the islands to Callao by collision with a British ship called the Brothers German.

The Lincoln thereupon proceeded to Callao, which was her nearest port, and came to anchor on the 24th day of July, 1870. She was then in distress, and unable to prosecute her voyage, by reason of the injuries received by said collision.

Among the rules of the port of Callao are the following:

"Vessels coming into port, except those laden with powder, petroleum, and other hazardous substances, and vessels from certain
20 ports which are subject to quarantine, not including the Guanape Islands, are anchored in rows or lines under the direction of the captain of the port, the first row or line being about four hundred yards from the pier or mole, and the other successive rows further out at distances of one hundred and twenty fathoms apart. Vessels discharging cargo to be taken on shore lie in the row nearest the shore, and vessels awaiting their turn to discharge cargo to be taken on shore in the second row; vessels coming in for clearance and orders anchor in the fourth row, and, if this is full, a fifth row is formed. The captain of the port boards all vessels arriving, and assigns to each its place; and vessels do not communicate with the shore until they take their place so assigned to them; but if a vessel comes in disabled or injured, she is visited by the government surveyors at once, wherever she may be."

All ships chartered for the exportation of guano are examined by a board of examiners, appointed for that purpose by the government, before sailing for the islands, and the depth to which they are allowed to be loaded fixed by the government and indicated by a mark on the ship. The Lincoln, before leaving Callao for the islands, was so examined, and her mark fixed at twenty-one feet draft.

On their arrival at Callao they are inspected by the same board of examiners, whose duty it is to see that they are loaded to

21 their proper depth. In case this board are of the opinion that they have been loaded in excess of this proper depth, as determined as aforesaid, they are required to discharge the excess into some other guano vessel in the harbor bound to the islands to load, if there is such in the harbor, as there almost always is. If no such is in the harbor, into a hulk.

On the arrival of the ship at Callao after the collision, the board of government examiners reported her to be nine inches deeper in the water than the twenty-one feet. When the ship left the islands for Callao she was not loaded below her said proper depth, and her greater draft of water on her arrival at Callao was occasioned by the leakage caused by said collision.

The rules of the port above set forth are not rigorously observed as to guano vessels arriving at Callao merely for clearance and orders in an undamaged condition, and had the Lincoln not been damaged by said collision, she probably would have proceeded to sea without leaving her first anchorage-ground, which was within the bay or port of Callao, and within the boundaries or lines of said port. By reason of her damaged condition she was compelled to leave her first anchorage-ground to discharge her cargo at the hulk—and then to be repaired at the dock hereinafter referred to.

A vessel coming into Callao for clearance and orders, in order to conform to said rules of the port, would not go to the place to which
22 the Lincoln was hauled to discharge, that is to say, alongside of said hulk, but would go to the berth assigned her as aforesaid by the captain of the port.

The hulk and the dry-dock hereinafter mentioned were both within the bay and harbor of Callao.

After the arrival at Callao of the Lincoln with the guano on board, three surveys were held on her, copies of which are hereto annexed, marked "D," which surveys, by agreement of the parties, were read as evidence of the statements in them contained, and correctly state the injuries received by reason of the collision.

The Lincoln, upon surveys being duly held at the place where she was anchored, was found to be so damaged by said collision that it was necessary, in order to enable said voyage to be prosecuted, to remove the said cargo, and to repair said vessel, and in order to accomplish this, it became necessary to remove said vessel from the place where she had anchored, which was not a berth designated by the captain of the port, but a place more distant from the shore than the rows of ships above described, to a place where the cargo could be discharged; that the vessel was thereupon removed, on the 8th of August, a distance of about a mile and a half further in, that is, in the direction of the mole or pier
23 near to which vessels discharging lay, and hauled alongside of a hulk at anchor in the fourth or fifth of said rows, where the cargo was discharged, except about 250 tons left in for ballast, and this being done, she was moved, on the 24th of September, 1870, about a mile, to a dock by the shore, into which she was taken, and there the damages suffered as aforesaid were repaired. All the repairs ordered in the surveys were made. They were not of a temporary, but of a permanent character, were rendered necessary by the collision, were necessary to enable the ship to prosecute her voyage to its termination, and by means thereof she was enabled to prosecute her said voyage to its termination, and on the 13th of October, 1870, she was removed from the dock and hauled alongside of the said hulk, where she was reloaded with the cargo discharged from her, except some forty-five to fifty tons.

The Lincoln was reloaded November 17, 1870, and she thereafter, on the 26th of January, 1871, set sail with the said cargo of guano, proceeded to Hampton Roads; thence, under orders received there, according to charter-party, to New York, where the cargo was discharged and delivered to the defendants, who were the consignees thereof, under a bill of lading duly given, which was, on the 31st of December, 1870 signed by the master, a copy of which is annexed to the declaration, marked "A."

Before the plaintiff delivered said cargo to the defendants, he
24 took from them the average-bond, a copy of which is annexed to the declaration, marked "B." Upon the delivery of said bond, the master delivered the cargo to the defendants, and the defendants paid the freight.

The said ship, at the times above stated, was of the value of twenty-one thousand dollars, ($21,000,) and the cargo delivered of the value of seventy-seven thousand eight hundred and ninety-three dollars, ($77,893,) net, and the freight-money earned, thirty thousand four hundred and sixteen dollars, ($30,416.)

There was expended at Callao by the master seventeen thousand three hundred and forty-nine dollars and $\frac{43}{100}$ dollars, ($17,349.43,) as to which the defendants' liability in general average is not contested, and of which the cargo is chargeable with the sum of eleven thousand eight hundred and forty-three dollars and seventy-one cents, ($11,843.71,) with interest from June 1, 1871, to the time of filing these findings, amounting to the sum of $2,232.06. The foregoing expenditure is exclusive of the items of wages and provisions, and Capt. Patterson's bill and expenses hereinafter mentioned.

The master also incurred expenses at Callao for the wages and provisions of the officers and crew up to November 17, 1870, when the ship was reladen, the sum of three thousand nine hundred and seventeen dollars and eighteen cents, ($3,917.18,) of which the cargo's pro-
25 portion, if chargeable in general average, is, by agreement of the parties, two thousand six hundred and seventy-four dollars and twenty-six cents, (2,674.26,) with interest from June 1, 1871, to the date of filing these findings, amounting to the sum of five hundred and eight $\frac{55}{100}$ dollars, ($508.55.)

It was necessary to keep as many men as were employed on board to take care of the ship properly for her safety in hauling the ship to and from the hulk on surf days, moving the ship to and from the dock, and in other employments about the ship on ship's duty while in dock. Under the contract with the repairers, it was the ship's duty to place the metals and all the materials used. These were all on the ship, and had to be placed underneath the ship, and to be watched, and the old nails and metals to be watched and picked up. This is a part of what the ship's men were doing with the other duties of the ship. Some of the yards had to be sent down when going into dock. It was necessary that the men employed should be sailors, able to haul the ship out at any moment in case of surf. The services of the sailors employed during the repairs of the vessel were necessary for her preservation and safety, and the prosecution of the voyage.

The detention of the vessel from July 25, 1870, to Nov. 17, 1870, was rendered necessary to repair damage occasioned by said collision,
26 and the expense of wages and provisions, as aforesaid, during that time, was incurred in consequence of said collision.

The foregoing amount, so far as it includes the provisions, is calcu-

lated according to the commutation for provisions in cases of general average customary in the port of New York.

The plaintiff, on learning of the disaster to the ship Lincoln, by collision, and that both she and the other colliding ship had arrived at Callao, and apprehending that difficulties would grow out of the disaster as between these vessels, sent out, on the 3d of September, 1870, from the United States to Callao, one Capt. Alfred Patterson, to aid in despatching the ship from Callao. Capt. Patterson arrived at Callao about the 1st of October, 1870, and remained in attendance on this business until the Lincoln sailed from Callao for New York. While there, he co-operated with the master of the ship. And the plaintiff has paid him for his services, and his board, and his travelling and incidental expenses during the period from Sept. 3d to November 17, 1870, the sum of one thousand five hundred and seventy-two dollars and forty-seven cents, ($1,572.47,) of which the cargo's proportion, if chargeable in general average, is, by agreement of the parties, one thousand and seventy-three dollars and fifty-two cents, ($1,073.52,) with interest from the first day of June, 1871, to the date of the filing of these find-
27 ings, amounting to the sum of two hundred and four $\frac{15}{100}$ dollars, ($204.15.)

The charterers had at all times a resident general agent to transact the business of and clear all guano ships arriving at Callao, chartered by them; their permanent place of business is at Lima; of both which facts the master knew from and after the date of the charter, and the plaintiff knew the same facts when he sent Capt. Patterson out.

By the usage of the port of New York, when the owner of a ship sends out an agent to a foreign port into which the ship has put in distress to advise and assist the master for the benefit of ship and cargo, the amount paid for the services of such agent, and his board and travelling and incidental expenses, are allowed in general average, without regard to the question whether or not he reaches the port of distress in time actually to render service, provided he is sent out in good faith with intention that he shall render service for the general benefit. The custom is a general one, and there is not any known exception where the owner of the cargo resides at or has any agent at the port of distress.

I find this usage upon the testimony of expert witnesses examined in this case, and none of them examined on this point were apparently aware of any case in which such charges either had been allowed when the port of distress was the place of residence of the cargo-owner
28 or his agent, or had been rejected on that account.

The owners of the cargo made no attempt to have the voyage abandoned or the charter-party rescinded, but retained all their rights under the charter-party.

N. SHIPMAN, *Judge.*

EXHIBIT A[2].

LIMA, 15 *January*, 1870.

To the managers of the United States Guano Consignment Company, Lima:

SIR: This is to confirm that, besides the two and one-half of one per cent. (2½) stipulated in the charter-party signed by us respectively this day, to be deducted from the freight of the ship Lincoln chartered to you for conveying a cargo of guano to the United States, I have agreed that the ship shall pay a similar commission of two & a half of one per

cent. (2½) on freight to your agent at New York, after arriving at destination & discharging cargo, by which is implied the "usual commissions" mentioned in the 11th printed line of second page of said charter-party, and, furthermore, that the ship shall pay to your agent at Callao one hundred and fifty dollars ($150) Peruvian currency, for clearing
29 the ship to the islands & when outward bound.

I remain, sir, yours, respectively,

GEORGE W. HOMANS.

D.—*Original survey.*

CALLAO, *July* 26, 1870.

At the request of the consul of Salvador, M. P. Grace, at this port, we, the undersigned, proceeded on board the ship Lincoln, for the purpose of surveying the damage to the above-named by collision on her voyage from Guanapes to this port, & report as follows:

1st. At 9 o'clock a. m. sounded the pumps and found sixteen (16) inches of water in the well.

2nd. Examined the parts damaged on starboard side, aft the foremast shroud of mizzen rigging, broken and part carried away. The sail-stancheons cant, and water-ways, from the broke of poop to quarter, more or less broken, & part carried away.

3d. The stancheons and rail aft broken and carried away.

4th. The steering-house on starboard side broken in; also top of house.

5th. The boom-kine blocks and gear connected, broken and gone.

6th. The stancheons, rail, & covering-board of the after cabin on
30 starboard side broken about twelve (12) feet, and part carried away.

7th. The stancheons, covering-board, & water-ways at the brake of poop are started fourteen (14) feet on each side of vessel.

8th. Proceeded below, main deck at the aft part of vessel, and found three (3) of the hanging-knees on each side started.

9th. Again proceeded on board the above-named vessel at 4 o'clock p. m., and sounded the pumps; found nineteen & one-quarter (19¼) inches of water, being nearly one-half (½) inch of water per hour.

The water in the bay calm.

We therefore are of the opinion that sufficient of the cargo be discharged for further examination, & recommend the same to be done.

ANTONIO A. DELA HOZA,
American Lloyds' Surveyor-General.
WM. B. DAVIS,
Master of Barque Ara.
JOSIAH BARRETT,
Constructor Naval.

Rec'd for the above survey, each, one (1) gold ounce.

ANTONIO A. DELA HOZA,
Surveyor-General.
WM. B. DAVIS.
JOSIAH BARRETT.

31 *2nd survey of Salv. ship Lincoln.*

At the request of the Salvadorian consul at this port, we, the undersigned, proceeded on board the Salvadorian ship Lincoln, for the purpose of further survey of damage from collision on the voyage from Guanapes Islands to Callao.

Proceeded on board at 12.30 p. m., & found the vessel mak ng an average of 10 inches of water in 24 hours on a draft at 16 feet 10 inches; having discharged about 900 tons; the bay calm; and cannot examine the parts of the vessel as to the leak or leaks; & we are of the opinion that the whole of the cargo should be discharged, & the ship docked for further examination.

Callao, Sept. 1, 1870.

ANTONIO A. DELA HOZA,
Surveyor-General.
JOSIAH BARRETT,
Constructor Naval.
WM. B. DAVIS,
Master Barque Ara.

Received for the within survey one (1) gold ounce each.

ANTONIO A. DELA HOZA.
JOSIAH BARRETT.
WM. B. DAVIS.

M. P. Grace, consul-general del Salvad*uen* el Peru como tal cer-
32 tifice que las firmas que menden subscribiendo il anterior informe de recondcieniento practicado en las Frajata Salvadarena Lincoln san las propias y verdade vas de. Don Antonio A. Dela Hoza, perita del Lloyd Americano, Josiah Barrett, constructor naval, y de Don Wm. B. Davis, capitan de la barca Ara, y como valy mericcu lo dapé.

Callao, October 26 de 1870.

MIGUEL P. GRACE,
Consul-General del Salvador.

At the request of the consul of Salvador, M. P. Grace, esq., at the port of Callao, we, the undersigned, proceeded to the floating-dock, for the purpose of surveying the ship Lincoln. Upon examination, we find the following damaged part by collision on her vovage from Guanapes Islands to this port, & we report as follows:

1st. We examined the copper, & find at the after part, on the starboard side, in way of the mizzen-mast, at the bilge, the copper in five places torn away & the outside planking damaged, & the copper from keel to the copper-line very much strained & twisted, evidently caused by collision.

2nd. Examined the port side, and find the keel & garboard streak, from the step of main-mast to the mizzen-mast step, the main
33 through fastening very much strained & leaking, evidently from the collision.

3d. We, therefore, recommend the vessel to be stripped, caulked, refitted, and coppered to the present copper-line; also the part above copper-line & deck to be caulked throughout, & any extra fastening that may be necessary to be put in.

4th. We have also examined the repairs done to the above-named vessel above water-line, caused by the collision, & find the whole repairs complete in every respect, including new sails, plank, shears, & bumpkin, & new shrouds to mizzen-rigging.

ANTONIO A. DELA HOZA,
American Lloyd's Surveyor-General.
BENJAMIN SMITH,
Master ship Winfield Scott.
JOSIAH BARRETT,
Constructor Naval.

cent. (2½) on freight to your agent at New York, after arriving at destination & discharging cargo, by which is implied the "usual commissions" mentioned in the 11th printed line of second page of said charter-party, and, furthermore, that the ship shall pay to your agent at Callao one hundred and fifty dollars ($150) Peruvian currency, for clearing
29 the ship to the islands & when outward bound.

I remain, sir, yours, respectively,

GEORGE W. HOMANS.

D.—*Original survey.*

CALLAO, *July* 26, 1870.

At the request of the consul of Salvador, M. P. Grace, at this port, we, the undersigned, proceeded on board the ship Lincoln, for the purpose of surveying the damage to the above-named by collision on her voyage from Guanapes to this port, & report as follows:

1st. At 9 o'clock a. m. sounded the pumps and found sixteen (16) inches of water in the well.

2nd. Examined the parts damaged on starboard side, aft the foremast shroud of mizzen rigging, broken and part carried away. The sail-stanchcons cant, and water-ways, from the broke of poop to quarter, more or less broken, & part carried away.

3d. The stanchcons and rail aft broken and carried away.

4th. The steering-house on starboard side broken in; also top of house.

5th. The boom-kine blocks and gear connected, broken and gone.

6th. The stanchcons, rail, & covering-board of the after cabin on
30 starboard side broken about twelve (12) feet, and part carried away.

7th. The stanchcons, covering-board, & water-ways at the brake of poop are started fourteen (14) feet on each side of vessel.

8th. Proceeded below, main deck at the aft part of vessel, and found three (3) of the hanging-knees on each side started.

9th. Again proceeded on board the above-named vessel at 4 o'clock p. m., and sounded the pumps; found nineteen & one-quarter (19¼) inches of water, being nearly one-half (½) inch of water per hour.

The water in the bay calm.

We therefore are of the opinion that sufficient of the cargo be discharged for further examination, & recommend the same to be done.

ANTONIO A. DELA HOZA,
American Lloyds' Surveyor-General.
WM. B. DAVIS,
Master of Barque Ara.
JOSIAH BARRETT,
Constructor Naval.

Rec'd for the above survey, each, one (1) gold ounce.

ANTONIO A. DELA HOZA,
Surveyor-General.
WM. B. DAVIS.
JOSIAH BARRETT.

31 *2nd survey of Salv. ship Lincoln.*

At the request of the Salvadorian consul at this port, we, the undersigned, proceeded on board the Salvadorian ship Lincoln, for the purpose of further survey of damage from collision on the voyage from Guanapes Islands to Callao.

Proceeded on board at 12.30 p. m., & found the vessel making an average of 10 inches of water in 24 hours on a draft at 16 feet 10 inches; having discharged about 900 tons; the bay calm; and cannot examine the parts of the vessel as to the leak or leaks; & we are of the opinion that the whole of the cargo should be discharged, & the ship docked for further examination.

Callao, Sept. 1, 1870.

ANTONIO A. DELA HOZA,
Surveyor-General.
JOSIAH BARRETT,
Constructor Naval.
WM. B. DAVIS,
Master Barque Ara.

Received for the within survey one (1) gold ounce each.
ANTONIO A. DELA HOZA.
JOSIAH BARRETT.
WM. B. DAVIS.

M. P. Grace, consul-general del Salvad*uen* el Peru como tal cer-
32 tifice que las firmas que menden subscribiendo il anterior informe de recondcieniento practicado en las Frajata Salvadarena Lincoln san las propias y verdade vas de. Don Antonio A. Dela Hoza, perita del Lloyd Americano, Josiah Barrett, constructor naval, y de Don Wm. B. Davis, capitan de la barca Ara, y como valy mericcu lo dapé.

Callao, October 26 de 1870.

MIGUEL P. GRACE,
Consul-General del Salvador.

At the request of the consul of Salvador, M. P. Grace, esq., at the port of Callao, we, the undersigned, proceeded to the floating-dock, for the purpose of surveying the ship Lincoln. Upon examination, we find the following damaged part by collision on her vovage from Guanapes Islands to this port, & we report as follows:

1st. We examined the copper, & find at the after part, on the starboard side, in way of the mizzen-mast, at the bilge, the copper in five places torn away & the outside planking damaged, & the copper from keel to the copper-line very much strained & twisted, evidently caused by collision.

2nd. Examined the port side, and find the keel & garboard streak, from the step of main-mast to the mizzen-mast step, the main
33 through fastening very much strained & leaking, evidently from the collision.

3d. We, therefore, recommend the vessel to be stripped, caulked, refitted, and coppered to the present copper-line; also the part above copper-line & deck to be caulked throughout, & any extra fastening that may be necessary to be put in.

4th. We have also examined the repairs done to the above-named vessel above water-line, caused by the collision, & find the whole repairs complete in every respect, including new sails, plank, shears, & bumpkin, & new shrouds to mizzen-rigging.

ANTONIO A. DELA HOZA,
American Lloyd's Surveyor-General.
BENJAMIN SMITH,
Master ship Winfield Scott.
JOSIAH BARRETT,
Constructor Naval.

Rec'd for the within survey one gold ounce each.

ANTONIO A. DELA HOZA.
BENJAMIN SMITH.
JOSIAH BARRETT.

M. P. Grace, consul-general del Salvader en el Peru, como tal certifico que las firmas que meeden subscribiendo el anterior informe del Reconocimiento practicado en la Frajata Salvaderena Lincoln, san las tropcias de Don Antonio A. Dela Hoza, perito del Lloyd Americano,
34 Don Benjamin Smith, capitan de la Frajata Winfield Scott, y de Don Josiah Barrett, constructor naval y como tales merican boda fé.

Callao, October 26 de 1870.

MIGUEL P. GRACE,
Consul-General del Salvador.

And the court thereupon adjudges and determines that the facts so found are sufficient to sustain a judgment in favor of the plaintiff by reason of the premises, over and above his costs and charges by him about his suit in this behalf expended, for the sum of eighteen thousand four hundred and thirty $\frac{43}{100}$ dollars, ($18,430.43,) and assesses his said damages at said last-named sum.

Therefore it is considered that the said plaintiff do recover against the said defendants his said damages, costs, and charges by the court so found and assessed, and also one hundred & eighty-one $\frac{63}{100}$ dollars ($181.63) for his costs and charges by the court here adjudged of increase to the said plaintiff with his assent, which said damages, costs, and charges in the whole amount to eighteen thousand six hundred and twelve $\frac{06}{100}$ dollars, ($18,612.06.)
35 And said defendant in mercy, &c.

Jud'ment signed this 19th day of February, 1874.

R. E. STILLWELL,
Deputy Clerk.

(Endorsed:) United States circuit court, so. dist. of New York. Daniel W. Lord vs. Joseph Hobson, José M. Hurtado. Judgment. Francis C. Barlow, plffs'. atty. Filed Feb. 25, 1874.

36 *Opinion of the court.*

DAMIEL W. LORD
vs.
JOSEPH HODSON ET AL.

SHIPMAN, J.:

The parties in the above-entitled cause having by written stipulation waived a jury, the case was tried by the court.

Upon said trial it was agreed that all the facts specifically admitted in the stipulation hereto annexed, and marked "A," should be admitted to be true.

(By agreement of the parties the stipulation is omitted, the material facts therein stated having been embodied in the findings of the court, which appear in the record.)

In accordance with said stipulation, and upon the evidence offered by both parties upon the questions of fact not therein specifically concede I find the following facts to be proved and true:

1st. All the facts specifically agreed to in said stipulation marked "A."

2d. That while the Lincoln was on her voyage from the Guanape islands to the port of Callao, for clearance and orders, she was
37 seriously damaged, in consequence of a collision with a British vessel; that she reached the port of Callao, which was her nearest port, on the 24th day of July, 1870, in the damaged condition stated in the three surveys marked "D," in distress, and unable prosecute her voyage; in consequence of said peril, it was necessary that she should be unladen and extensively repaired; that said repairs were necessary in order to enable her to prosecute her voyage, and by means thereof the voyage was prosecuted. Said repairs were made, and the vessel was reloaded with reasonable dispatch. The repairs were completed, and the vessel reloaded on the 17th of November, 1870.

3d. That the rules of the port, set forth in the stipulation marked "A," are not rigorously observed as to guano-vessels arriving at Callao merely for clearance and orders in an undamaged condition, and that, had she not been damaged by said collision, she probably would have proceeded to sea without leaving her first anchorage-ground, which was within the bay or port of Callao, and within the boundaries or lines of said port.

38 4th. That, by reason of her damaged condition, she was compelled to leave her first anchorage-ground, discharge her cargo at the hulk, about one mile from said anchorage, and then be repaired at the dock, about one and one-half miles from the hulk.

5th. That the services of the sailors employed during the repairs of the vessel were necessary for her preservation and safety, and the prosecution of the voyage, and the amount expended for their provisions was a reasonable amount.

6th. That the detention of the vessel from July 25, 1870, to November 17, 1870, was rendered necessary to repair the damages occasioned by said collision, and that the expenses of said sailors, during said time, were also incurred in consequence of said collision.

7th. That Capt. Patterson's expenses and salary, during the time of said repairs, are a subject of general average, according to the customs of the port of New York.

8. That the litigation was commenced and prosecuted by the Peruvian government, the owners of the cargo, on account of their reasonable fear that the captain was intending to pledge the cargo as
39 well as the vessel as security for the necessary expenses of said repairs and of said vessel.

9th. That the owners of the cargo made no attempt to have the voyage abandoned, or the charter-party rescinded, but retained all their right under said charter-party.

10th. That there is no evidence that the owners were ever informed of the master's need of money to disburse the ship, to pay the expenses of the repairs, and of the unloading and reloading the cargo, and of her detention, *and of her detention*, and the owners' delay in sending money was unexplained.

Three items of the expenses only were in dispute between the parties—

I. The wages and provisions during the entire detention at Callao.

II. The expenses and salary of Capt. Patterson during the entire detention.

III. The fees of Abraham Wendell, esq.

The conclusions from the foregoing facts are as follows:

1st. As to wages and provisions during the time properly occupied by repairs.

It is earnestly contended by the defendants that wages and provisions are only chargeable in general average when the vessel in distress departs from her prescribed course, and bears away to a port of refuge for repairs necessary to enable her to prosecute her voyage; that in this case she was repaired at the port to which she was destined for clearance and orders, and that the American rule has never been extended to the allowance of wages and provisions expended at an intermediate port where the injured vessel was bound to stop.

In order to a determination of the question, a brief examination of the principle upon which wages and provisions at a port of refuge have been allowed is necessary.

General average is succinctly defined to be "a contribution made by all the parties concerned in a sea-adventure to make good a specific loss or expense voluntarily sustained or incurred by some or one of them for the benefit of all." (Burrill's Law Dict., vol. 1, page 167.)

"The rule as to what constitutes a general average or not is founded upon the consideration whether it" (that is, the nature and
41 object of the thing done or sacrifice made) "is for the benefit of all who are or may be interested in the accomplishment of a voyage, or only for the benefit of a particular party." (Potter v. Ocean Ins. Co., 3 Story, 39.)

The principle upon which the cargo has been made to contribute to the expenditures at a port of *of* refuge is that the expenditure for wages and provisions was for its benefit as well as for the benefit of the ship. The expenses of the sailors are not merely incidental to the repairs, but are for the actual benefit of the cargo, in this, that they are necessary to the safety of the ship while in port, and especially to the subsequent prosecution of the voyage.

In Nelson v. Belmont, 21 N. Y., 36, the court say: "Physical destruction or direct physical injury to the ship or cargo itself is not the only risk to which property so situated is exposed. Its value depends, or at least is supposed to depend, upon the successful prosecution of the voyage.

"Whatever threatens the voyage, therefore, is a peril to the entire property. Until that is broken up, unless the property claimed to be exempt is not only separated from the rest, and put in a place of present
42 safety, but entirely disconnected with the enterprise, it must be regarded as still at risk and liable to contribute. If the voyage is not abandoned, and the property, although separated from the rest, and removed from the ship, is still under the control of the master, and liable to be taken again on board for the purpose of being carried to its destined port, the relations of the several owners are in no respect changed. The common interest remains, and whatever is done for the protection of that common interest must be done at the common expense."

Cargoes could often be landed in safety at ports of refuge and be forwarded to the port of destination without much expense. But this is never permitted, certainly not without the concurrence of the master, and probably not without the payment of freight. In this case the owners of the cargo made no attempt to free themselves from the charter-party, and held the owner to his obligation to transport the cargo to the port of destination.

In order to prosecute the voyage the sailors must ordinarily be retained. If retained, the expenses should, in conformity with the

43 principles which have been cited, be borne by all for whose benefit they are incurred.

"It is necessary that the mariners should remain for the purpose of proceeding to the port of discharge as soon as the inevitable misfortune, the causus fortuitus, creating the delay is removed. The cargo might be sacrificed at the intermediate port, if the crew were not to be detained; and the expense of their detention, being for the common benefit, ought to be apportioned as a common burden." (Walden v. Le Roy, 2 Carnes, 262.)

If these principles are correct, I see no adequate reason why the cargo, being at risk in the port of Callao, should not pay for the wages and provisions necessarily expended there, with fully as much justice as if the cargo had been at risk in a port of refuge away from her course. The risk to the voyage is as great at the one port as at the other.

It was impossible for the cargo to be landed at the place of its destination unless the vessel was repaired, and the repairs must be made at Callao. The services of the sailors were necessary during the
44 detention at Callao for the safety of the vessel and the due prosecution of the voyage. It seems to me that the case comes directly within the principles laid down by Judge Story in Potter v. Ocean Ins. Co., and by Ch. Kent in Walden vs. Le Roy.

It is true that it is generally stated in the books, that if the ship bears away to a port of refuge, wages and provisions during the detention are a part of general average to be borne by the cargo, and the inference is drawn that such allowance is limited to the case of a "bearing away." This phraseology has probably arisen from the fact that in ordinary cases a distressed ship is compelled to bear away to a port of refuge, and not from an intention on the part of courts to limit the rule in any arbitrary manner.

This vessel was injured while at a short distance from Callao, which was her nearest port. She struggled on until she made the port safely. Had she not been bound thither, she would probably have been compelled to seek it as a port of refuge. It thus became not merely her port of destination, but her port of refuge in distress.

45 Inasmuch as the principle of the American rule applies to the case of expenditures incurred for the benefit of all parties at an intermediate port, whither the vessel was bound to touch for orders, and as a limitation of the rule to expenditures at a port of distress out of the course of the voyage seems to me a limitation without foundation in reason, the conclusion is that the wages and provisions during the time of repairs are to be allowed.

Much testimony was taken by the plaintiffs to show that if the vessel had not needed repairs she would merely have touched at Callao, have sailed from her first anchorage-ground, and would not have been compelled to go to the inner portion of the harbor, about two and one-half miles distant, and that therefore she did deviate from the line of her voyage.

But I am disposed to place the decision upon any mere technical deviation from a lengthening of her voyage. Callao was an intermediate port to which the vessel was bound. She anchored within the boundaries or lines of the port. There it was discovered that she must be extensively repaired, and she was accordingly moved to a point in the port, where repairs could conveniently be made.

46 If the rule for which the defendants contend is the correct one, I am not inclined to evade it by any technical deviation of a

couple of miles made within the limits of an intermediate port where the vessel is bound.

2. As to the wages and provisions after the repairs were completed.

The detention of the vessel and the expenses after Nov. 17, 1870, were in consequence of the master's lack of funds to disburse the ship, and the litigation with the owners of the cargo.

Had the master been in possession of funds, the attempt to raise money by bottomry and hypothecation would have been unnecessary, and the litigation would have been avoided.

If there was sufficient evidence to find that this want of funds was occasioned by the inability of the owner to supply the master, or if it could be found that the master had attempted to procure the necessary funds from the owner without avail, a different question would have presented itself.

47 It is stated in the stipulation that there were two mails monthly from Callao to Boston, and that letters were in course of transmission from 22 to 28 days. It is also found that the owner knew of the collision at least as early as the 3d of September, for on that day he sent Capt. Patterson to the assistance of the master.

There is no evidence that either the master or the agent ever attempted to obtain funds from the owner of the vessel during the time of the repairs, neither is there any evidence that the owner was unable to furnish the requisite money. There is no attempt made to explain the delay of the owner.

From the care and accuracy with which the stipulation has been prepared on the part of the plaintiff, it is not unfair that the omission of evidence upon these points is not accidental.

It is thus impossible to find either that the detention of the vessel after Nov. 17 was necessary for the safety of the vessel, or the prosecution of the voyage, or that the detention was the necessary result of the collision.

Unless one of these facts is found, it will not be claimed that
48 the cargo should contribute to the expenses of this delay.

It thus becomes as unnecessary as it would be improper to consider the question whether the courts of Peru were or were not correct in their conclusion that the master had no right to hypothecate the cargo.

The Peruvian courts had full jurisdiction of the matter and of the parties. The master appeared, and in the contest, which he conducted with vigor, was unsuccessful. By their decision the parties to the action must be considered bound.

If the delay is attributable in any material respect to the litigation, it seems to me that it would be unjust to visit any portion of the expenses of the detention upon the successful party.

3. As to the expenses and salary of Captain Patterson.

By the terms of the general-average bond, the average is to be adjusted "conformably to law and the usages of the port of New York."

From the testimony it seems that the reasonable expenses and
49 salary of an agent, sent in good faith by the owner to assist the vessel in distress, are allowed by the custom of the port of New York, irrespective of the benefit which his presence and services afforded. The custom is a general one, and there is not any known exception where the owners of the cargo have an agent at the port of distress. The allowance is made, if the owner sends an agent in good faith.

If the bond had not specified that the average should be adjusted according to the custom of the port of New York, I should not be disposed to allow the charge. But the question of its allowance in this

case is one of fact rather than of law, and I find that as a fact the custom is as above stated.

For the reasons heretofore given, the allowance to Capt. Patterson is to be limited to the period of repairs.

4th. As to the allowance of the lawyer's fees during the litigation.

This seems to me inadmissible. The lawyer's services were not rendered for the benefit of the cargo or for the prosecution of the voyage.

He was employed to aid the master in the litigation with the
50 owners of the cargo, which, as has been seen, was on his part a fruitless and unavailing contest.

The result is that so much only of the wages and expenses of the provisions of the officers and crew as accrued from July 25, 1870, to Nov. 17, 1870, and the salary and board of Capt. Patterson to the latter date, should be allowed.

In accordance with the stipulation, the amount will be ascertained, and the average adjusted by John S. Tyler, esq.

51 (Indorsed:) Daniel W. Lord vs. Joseph Hodson et al. Judge Shipman. Decision. Filed December 29, '73.

52 Circuit court of the United States, southern district of New York

JOSEPH HOBSON, JOSÉ M. HURTADO, pl'ffs in error, *vs.* DANIEL W. LORD, DEF'T IN ERROR. } Of October term, A. D. 1873.

Afterwards, to wit, on the day of , in this same term, comes the said Joseph Hobson and José M. Hurtado, by Prichard, Choate & Smith, their attorneys, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matter therein contained, are not sufficient in law for the said Daniel W. Lord to have or maintain his aforesaid action thereof against them the said Joseph Hobson and José M. Hurtado; and that there is error
53 also in this, to wit, that by the record aforesaid it appears that the judgment aforesaid was given for the said Daniel W. Lord against the said Joseph Hobson and José M. Hurtado, whereas, by law, the said judgment ought to have been given for the said Joseph Hobson and José M. Hurtado; and that there is also error in this, to wit, that by the record aforesaid it appears that the facts found are not sufficient to support the said judgment; and that there is error also in this, to wit, that it appears by said record that the sum of two thousand six hundred and seventy-four dollars and twenty-six cents, ($2,674.26,) with interest thereon, amounting to the sum of five hundred and eight dollars and fifty-five cents, ($508.55,) is included in said judgment, on account of the expense incurred by the said Daniel W. Lord for wages and provisions, whereas by law and the findings of the court upon the
54 facts said sum ought not to have been included in said judgment; and that there is error also in this, to wit, that it appears by said record that the sum of one thousand and seventy-three dollars and fifty-two cents, ($1,073.52,) with interest thereon, amounting to the sum of two hundred and four dollars and fifteen cents, ($204.15,) is included in said judgment, on account of the expense incurred by the said Daniel W. Lord in sending out a special agent to Callao aforesaid, whereas, by law, and by the findings of the court upon the facts, said sum and in-

terest ought not to have been included in said judgment; and that there is error also in this, to wit, that said judgment was entered for a larger sum than the said Daniel W. Lord upon the said findings was entitled by law to recover. And the said Joseph Hobson and José M. Hurtado pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that there may be restored
55 to all things which they have lost by occasion of the said judgment.

PRICHARD, CHOATE & SMITH,
Attys. for Pl'ffs in Error.

(Endorsed:) Circuit court of the U. S., so. dist. of New York. Joseph Hobson et al., pl'ffs in error, vs. Daniel W. Lord, def't in error. Assignment of errors. Prichard, Choate & Smith, attys. for pl'ffs in error, 49 Wall st., N. Y. Filed March 5, 1874.

56 U. S. circuit court, southern dist. of New York.

JOSEPH HOBSON AND JOSÉ M HURTADO, PLFFS. in error,
vs.
DANIEL W. LORD, DEFT. IN ERROR.

And afterwards, to wit, on the 19th day of March, A. D. 1874, in the said October term, in the year A. D. 1873, the said Daniel W. Lord, by Charles C. Beaman, jr., his attorney, freely comes here into court and says that there is no error, either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid, and he prays that the Supreme Court of the United States may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

CHARLES C. BEAMAN, JR.,
Attorney for Deft. in Error.

57 (Endorsed:) U. S. circuit court, so. dist. of New York. Joseph Hobson and José M. Hurtado, pliffs. in error, vs. Daniel W. Lord, deft. in error. Joinder in error. Charles C. Beaman, jr., atty. for deft. in error. Filed March 19, 1874.

58 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

JOSEPH HOBSON & JOSÉ M. HURTADO, PLAINTIFFS in error,
vs.
DANIEL W. LORD, DEFENDANT IN ERROR.

Know all men by these presents that we, Joseph Hobson and José M. Hurtado, plaintiffs in error, together with Franklin Woodruff and Mark W. Maclay, are held and firmly bound unto the above-named Daniel W. Lord in the sum of nine thousand & seventy-two $\frac{58}{100}$ dollars, to be paid to the said Daniel W. Lord; for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, execu-

tors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the second day of March, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas the above-named Joseph Hobson & José M. Hurtado have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York in the second circuit:

Now, therefore, the condition of this obligation is such that if the above-named Joseph Hobson & José M. Hurtado shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOSEPH HOBSON. [L. S.]
J. M. HURTADO. [L. S.]
FRANKLIN WOODRUFF. [L. S.]
M. W. MACLAY. [L. S.]

Sealed and delivered and taken and acknowledged this 2d day of March, 1874, before me.

EDWARD L. OWEN,
U. S. Commissioner.

59 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Franklin Woodruff and Mark W. Maclay being duly sworn, do depose and say, and each for himself saith, that he is worth the sum of nine thousand & seventy-two $\frac{58}{100}$ dollars over and above all his just debts and liabilities.

FRANKLIN WOODRUFF.
M. W. MACLAY.

Sworn to this 2d day of March, A. D. 1874, before me.

EDWARD OWEN,
U. S. Commissioner for the Southern Dist. of New York.

(Indorsed:) Vol. , page . U. S. circuit court. Joseph Hobson & José M. Hurtado, plffs. in error, vs. Daniel W. Lord, deft. in error. Bond for costs on writ of error. Pritchard, Choate & Smith, attys. for plffs. in error. , proctor.

Approved as to form & manner of execution & sufficiency of the sureties.

March 2, 1874.

FRANCIS C. BARLOW,
Atty. for Deft. in Error.

Filed March 5, 1874.
Approved M'ch 2, 1874.

SAML. BLATCHFORD.

60 UNITED STATES OF AMERICA, *ss:*

To DANIEL W. LORD, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the Capitol in the city of Washington, on the second Monday of October next, pursuant to a writ

of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Joseph Hobson and José M. Hurtado are plaintiffs, and you are defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the said Supreme Court of the United States, this 3d day of March, in the year of our Lord one thousand eight hundred and seventy-four.

SAML. BLATCHFORD.

61 (Indorsed:) U. S. circuit court, southern district of New York. Joseph Hobson and José M. Hurtado, plffs. in error, against Daniel W. Lord, deft. in error. Citation on writ of error. Prichard, Choate & Smith, attys. for plffs. in error. Filed M'ch 5, 1874.

I hereby admit due service of a copy of the within citation, dated New York, March 5, 1874.

FRANCIS C. BARLOW,
Atty. for Deft. in Error.

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of judgment of a plea, which is in said circuit court, before you, or some of you, between Daniel W. Lord, plaintiff, and Joseph Hobson and José M. Hurtado, defendants, which judgment was entered on the 20th day of February, 1874, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the Capitol in the city of Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

63 Witness the honorable Nathan Clifford, associate justice of the said Supreme Court, the 3rd day of March, in the year of our Lord one thousand eight hundred and seventy-four.

KENNETH G. WHITE, *Clerk.*

The foregoing writ is allowed, March 3d, 1874.

SAML. BLATCHFORD.

(Indorsed:) U. S. circuit court, southern dist. of New York. Joseph Hobson and José M. Hurtado, plffs. in error, vs. Daniel W. Lord, deft. n error. Writ of error. Prichard, Choate & Smith, attys. for plffs. in error. Filed Mch. 5, 1874.

UNITED STATES OF AMERICA,
Southern Dist. of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United
64 States for the southern district of New York, in the second circuit, do hereby certify that, by virtue of the foregoing writ of error, and in obedience thereto, that the foregoing pages, numbered from one to sixty-one inclusive, contains a true and complete transcript of the record and proceedings had in said court, in the case of Joseph Hobson and Jose M. Hurtado, plffs. in error, vs. Daniel W. Lord, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 10th day of June, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-eighth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

(Indorsement on cover:) No. 189. Joseph Hobson & José M. Hurtado, plaintiffs in error, vs. Daniel W. Lord. S. New York, C. C. U. S. Filed 12th June, 1874.

Supreme Court of the United States.

JOSEPH HOBSON *et al.*,
Plaintiffs in Error,
vs.
DANIEL W. LORD,
Defendant in Error.

Brief for Plaintiffs in Error.

See Index at end.

STATEMENT OF THE CASE.

Error to the Circuit Court of the United States for the Southern District of New York.

Defendant in error, Daniel W. Lord, sued the plaintiffs in error, Joseph Hobson and José M. Hurtado, in said court, in assumpsit on a general average bond, laying his damages at $25,000 (fols. 2–8).

Plaintiffs in error pleaded the general issue (fol. 17), in which defendant in error joined (fol. 18).

A jury trial was waived by stipulation (fol. 18). The facts were found specially by the court (fol. 18), and judgment was ordered for the defendant in error for $18,430 43 and costs (fol. 34).

The facts, as found by the court, so far as they affect the points that arise on the errors assigned, are as follows:

The plaintiff (defendant in error) was the owner of the ship Lincoln (fol. 18). January 15th, 1870, the plaintiff, through his agent, the master, chartered the ship, then being at Callao, to the "Compania Consignataria de Guano en los Estados Unidos de America," acting agents for the Peruvian Government, to proceed on a voyage, after being put in good order at the ship's expense, from Callao to the Chincha or Guanape Islands, there to take a cargo of guano on board, and proceed to Callao for final clearance, or to sail directly from the islands, according to charterer's orders (fols. 10, 11). The charter further provided, that after loading, she should proceed to Hampton Roads for orders from the charterers as to her port of discharge in the United States, not south of Norfolk nor north of Cape Ann (fol. 13). That the ship should be consigned to charterers' agents at New York, or their agents at the port of discharge, who are to charge usual commissions. The charter contained the following clause.

"And if, by any unforeseen event, the vessel should enter any port or ports on the Pacific or Atlantic coast, or in any of its islands, to repair damages, &c., the master shall consign her to the agent or agents of the "Compania Cosignataria de Guano, &c." (paying usual commissions), who shall perform all business belonging to the ship and cargo. Said agents are—in Valparaiso, Ruis y Pardo; in Talcahuno, Montevideo, Rio Janeiro, St. Thomas, and in other ports, the parties authorized by the said company, or the agents in the ports above mentioned" (fol. 16).

It also contained the following: "The ship shall, after completing her cargo, be inspected at the port of clearance, at her own expense, by a person appointed by the charterers and by government surveyors, in order to ascertain again her sound and seaworthy condition" (fol. 16).

The charter contained the usual exceptions of the acts of God, &c., &c. (fol. 17).

In a letter signed by the master on the same day that

the charter party was executed, it was further agreed that the ship should pay to the agent of the charterers at Callao, one hundred and fifty dollars for clearing the ship to the islands, and when outward bound (fols. 19, 28).

In accordance with the charter party the Lincoln proceeded to the Guanape Islands, was loaded with guano, and on her return to Callao by direction of the charterers for clearance and orders, was injured by collision with another vessel, and went on to Callao, which was her nearest port, and came to anchor July 24, 1870 (fol. 19). She was then in distress and unable to prosecute her voyage by reason of the injuries received by the collision (fol. 19). The rules of the port of Callao require vessels to anchor in rows off the mole or pier, under direction of the captain of the port (fol. 20). The rules are not rigorously observed as regards guano ships arriving for clearance and orders merely in an undamaged condition, and if she had not been damaged she would probably have proceeded to sea from her first anchorage ground, which was within the bay or port of Callao and within the lines or boundaries of the port (fol. 21), On account of her injuries she was removed to a hulk in one of the rows of ships, into which her cargo was discharged and from thence to a dry dock, where she was repaired (fols. 22, 23). If she had observed the rules, she would not have been hauled to the hulk but to some other place in the rows of ships assigned by the captain of the port (fol. 22). The hulk and dry dock are both within the harbor of Callao (fol. 22). The distance from her first anchorage to the hulk was about a mile and a half in the direction of the mole or pier (fol. 22). The distance from the hulk to the dry dock was about a mile (fol. 23). Surveys upon the Lincoln showed that she was leaking and badly damaged by the collision, and that it was necessary to remove her cargo in order to make the repairs (fol. 23) (see surveys, fols. 29–32).

She was accordingly moved to the hulk Aug. 8th, to discharge her cargo, and this being done, she was moved to the dock September 24th, where she was repaired. These

repairs were of a permanent, not of a temporary character (fol. 23). They were necessary to enable the ship to prosecute her voyage to its termination (fol. 23). Oct. 13th, the repairs being completed, she was again hauled alongside of the hulk and reloaded with her cargo, except 45 or 50 tons. She was reloaded November 17, 1870, and sailed for Hampton Roads Jan'y 26, 1871, and thence, under orders received there, to New York, where she delivered her cargo to the defendants (plaintiffs in error), who were the consignees thereof under bills of lading (fol. 24).

Before the delivery of the cargo, the defendants (plaintiffs in error) gave an average bond to the plaintiff (defendant in error) (fol. 24). The bond recited the fact of the collision, and that damages had been sustained which made it necessary to discharge the cargo and refit, "whereby sundry expenses and charges have arisen and various sacrifices have been made which are the subject of a general average," and binds the consignees, in consideration of the premises and of the delivery to them of the cargo, to pay to the plaintiff (defendant in error) whatsoever sums might be found due from them for their proportion of such expenses, charges and sacrifices as have arisen in consequence of the disaster, such payment to be made "whenever and so soon as the average shall be adjusted conformably to law and the usages of the port of New York" (see bond, fols. 9, 10).

The ship was of the value of $21,000, the cargo $77,893, and the freight $30,416 (fol. 24).

There was expended at Callao by the master $17,349 43, as to which defendants' liability in general average is not contested, and of which the cargo is chargeable with $11,843 71 and interest thereon, $2,232 06. This did not include the items of wages and provisions and Capt. Patterson's bill, which are the disputed items (fol. 24).

The wages and provisions of the master and crew up to November 17, 1870, when the ship was reladen, amounted to $3,917 18, of which the cargo's proportion, if chargeable in general average, is $2,674 26, with interest from June 1,

1871, to the date of the Judge's findings, $508 55 (fols. 24, 25).

As to this item of wages and provisions, the Judge further found, specially, as follows:—It was necessary to keep as many men as were employed on board to take care of the ship properly, for her safety in hauling the ship to and from the hulk on surf days, moving the ship to and from the dock, and in other employments about the ship on ship's duty while in dock. Under the contract with the repairers, it was the ship's duty to place the metals and all the materials used. These were all on the ship, and had to be placed underneath the ship, and to be watched, and the old nails and metals to be watched and picked up. This is a part of what the ship's men were doing, with the other duties of the ship. Some of the yards had to be sent down when going into dock. It was necessary that the men employed should be sailors able to haul the ship out at any moment in case of surf. The services of the sailors employed during the repairs of the vessel were necessary for her preservation and safety and the prosecution of the voyage (fol. 25). The detention of the vessel from July 25, 1870, to November 17, 1870, was rendered necessary to repair damage occasioned by said collision, and the expense of wages and provisions as aforesaid, during that time was incurred in consequence of said collision (fol. 25).

As to the other disputed item, Capt. Patterson's bill, the Judge found, specially, as follows (fol. 26–28):

The plaintiff, on learning of the disaster to the ship Lincoln, by collision, and that both she and the other colliding ship had arrived at Callao, and apprehending that difficulties would grow out of the disaster as between these vessels, sent out on the 3d of September, 1870, from the United States to Callao, one Capt. Alfred Patterson to aid in dispatching the ship from Callao. Capt. Patterson arrived at Callao about the 1st of October, 1870, and remained in attendance on this business until the Lincoln sailed from Callao for New York. While there he co-operated with the master of the ship, and the plaintiff has paid

him for his services and his board and his traveling and incidental expenses during the period from Sept. 3d to November 17, 1870, the sum of one thousand five hundred and seventy-two dollars and forty-seven cents ($1,572 47), of which the cargo's proportion, if chargeable in general average, is, by agreement of the parties, one thousand and seventy-three dollars and fifty-two cents ($1,073 52), with interest from the first day of June, 1871, to the date of the filing of these findings, amounting to the sum of two hundred and four $\frac{15}{100}$ dollars ($204 15) (fol. 26).

The charterers had at all times a resident general agent to transact the business of and clear all guano ships arriving at Callao, chartered by them; their permanent place of business is at Lima; of both which facts the master knew from and after the date of the charter, and the plaintiff knew the same facts when he sent Capt. Patterson out (fol. 27).

By the usage of the port of New York, when the owner of a ship sends out an agent to a foreign port into which the ship has put in distress, to advise and assist the master for the benefit of ship and cargo, the amount paid for the services of such agent and his board and traveling and incidental expenses, are allowed in general average, without regard to the question whether or not he reaches the port of distress in time actually to render service, provided he is sent out in good faith with intention that he shall render service for the general benefit. The custom is a general one, and there is not any known exception where the owner of the cargo resides at or has any agent at the port of distress (fol. 27).

I find this usage upon the testimony of expert witnesses examined in this case, and none of them examined on this point were apparently aware of any case in which such charges either had been allowed when the port of distress was the place of residence of the cargo owner or his agent, or had been rejected on that account (fol. 27).

The owners of the cargo made no attempt to have the

voyage abandoned or the charter party rescinded, but retained all their rights under the charter party (fol. 28).

The court adjudged these facts sufficient to sustain a judgment for the plaintiff for $18,430 43, with costs, which was the sum of the undisputed items, as aforesaid, and the cargo's proportion of the wages and provisions, and of Capt. Patterson's bill (fol. 34).

The judge gave a written opinion in favor of the plaintiff on the two disputed points:

1st. As to wages and provisions (fols. 40–46).
2d. As to Capt. Patterson's bill (fols. 48, 49).

Other items claimed and discussed in the opinion, having been disallowed by the judge, are now immaterial.

Judgment was entered conformably to the opinion (fol. 34).

The defendants bring this writ of error (fol. 62).

II.—ASSIGNMENT OF ERRORS.

The following errors are assigned and insisted on here:

1. That the said sum of $2,674 26, expended by defendant in error for wages and provisions while the ship was at Callao, down to Nov. 17th, when the repairs were completed, with interest thereon, amounting to $508 55, was erroneously included in the judgment (fol. 53), whereas the wages and provisions of the crew during a detention to refit are not general average, unless the vessel departs from the course of her voyage, nor during the detention, under the special provisions of this charter party, and the special facts of this case.

2. That the said sum of $1,073 52, expended by defendant in error in sending a special agent to Callao, with interest thereon, amounting to $204 15, was erroneously included in the judgment (fol. 54); whereas neither by any

custom proved, nor by law, are such expenses general average when the agent is sent to the home port of the charterer or his agent, and especially not under the provisions of this charter and the facts of this case.

3. That the judgment was entered for a larger sum than upon the facts found, defendant in error was entitled to recover (fol. 54).

POINTS AND AUTHORITIES.

AS TO THE CLAIM FOR WAGES AND PROVISIONS.

Three questions of law arise as to the wages and provisions:

1st. Are wages and provisions allowed in general average during detention for repairs, where the ship meets with a disaster at sea, by collision, which renders repairs necessary in order to the further prosecution of the voyage, in case she does not bear away from the course of her voyage to a port of refuge, but proceeds after the injury to the port to which she was bound at the time of the injury, and is there repaired, the repairs being of a permanent, not of a merely temporary character?

2d. If not, is it a departure from the course of her voyage, within the meaning of the rule allowing wages and provisions in general average, for the vessel to leave her anchorage within the port, in the proper course of her voyage, at which she arrives in distress, from which anchorage she would, if uninjured, have probably sailed in the further prosecution of the voyage, to go to another place within the same port to discharge her cargo, the discharge of the cargo being necessary for the purpose of making the repairs, and to still another place to receive her repairs, all of said places being within the same bay and port?

3d. If on either of the foregoing grounds the wages and provisions are allowed in general average, were they properly allowed in this case under the peculiar provisions of this charter party, and on the facts of this case?

FIRST POINT.

WAGES AND PROVISIONS DURING A DETENTION TO REPAIR (UNLESS THE CAUSE OF THE INJURY BE ITSELF A GENERAL AVERAGE LOSS) ARE NOT GENERAL AVERAGE, EXCEPT WHEN THE VESSEL, IN A PROPER CASE OF IMMINENT PERIL TO SHIP AND CARGO, OR TO THE VOYAGE, VOLUNTARILY AND TO ESCAPE THE PERIL, LEAVES THE PROPER COURSE OF HER VOYAGE, AND BEARS AWAY TO A PORT OF REFUGE; BECAUSE, EXCEPT IN THAT CASE THE WAGES AND PROVISIONS DURING THE DETENTION ARE NOT GIVEN OR SACRIFICED FOR THE COMMON BENEFIT, BUT ARE BOUGHT AND PAID FOR BY THE STIPULATED FREIGHT FOR THE VOYAGE, AND THE SHIP, IN HER DELAY FOR REPAIRS, HAS ONLY COMPLIED WITH HER CONTRACT WITH THE SHIPPER.

I. Of the origin and admitted principles on which general average rests.

The law of general average obviously and confessedly had its origin in *jettisons*.

Chancellor Kent says (3 Kent's Com. 12th ed. p. 233): "By the Rhodian law, as cited in the Pandects, if goods were thrown overboard in case of extreme peril, to lighten and save the ship, the loss, being incurred for the common benefit, was to be made good by the contribution of all. The goods must not be swept away by the violence of the waves, for then the loss falls entirely upon the merchant or his insurer, but they must be intentionally sacrificed by the mind and agency of man, for the safety of the ship and the residue of the cargo. The jettison must be made for sufficient cause, and not from groundless timidity. It must be

made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, or is laboring upon rocks and shallows, or is closely pursued by pirates or enemies; and then, if the ship and the residue of the cargo be saved by means of the sacrifice, nothing can be more reasonable than that the property saved should bear its proportion of the loss. The doctrine of general average is one of those rules of the marine law which is built upon the plainest principles of justice; and it has accordingly recommended itself to the notice and adoption of all the commercial nations of the world. The title in the Pandects, *De Lege Rhodia de Jactu*, has been the basis of the ordinances of modern Europe, on the subject of general average; and the doctrine of jettison was transplanted into the Roman law from the institutes of the ancient Rhodians. A jettison is only permitted in cases of extreme necessity; and the foreign ordinances require that the officers of the ship and the supercargo, if on board, should, if practicable, be previously consulted."

Mr. Lowndes, a recent English writer of authority on the Law of Average, says of this fragment from the Law of Rhodes: "Modern definitions of general average may be more scientific, because more abstract in form; but the oldest definition of all, that borrowed by the Digest from the Rhodians, eclipses them all in concise fullness. In about a dozen words it gives the law, the reason of it, and a perfect example:

> "*Si, levandæ navis gratiâ, jactus mercium factus sit, omnium contributione sarciatur, quod pro omnibus datum est.*"

The other instances of general average loss given in the Digest show that the case of jettison is here only put by way of illustrating the principle, namely, that whatever, in a time of danger, is *given* for the sake of all, must be replaced by the contribution of all.

Immediately after this statement of the principle I have placed the statement of the limiting or counterbalancing

principle, that accidental damage, though suffered by the ship during its exposure to risk in the service undertaken for carrying the cargo, is not to be the subject of contribution, any more than a blacksmith who may break his hammer, whilst doing work for which he is paid by another, may require the latter to pay for a new hammer. The whole law of general average consists in the application of these two principles."—(*Lowndes on Average*, 2d edition *Appendix A*, *pp.* 305–307).

And so in strict analogy to the case of a jettison, which is the sacrifice of part of the cargo, the cutting away of a mast, the damage done to goods exposed to lighten the ship, the loss of goods put into lighters to enable the ship to reach its haven, were all held cases of general average by the Roman law, and were the precedents in the light of which the law of general average has been expounded by the courts of England and the United States. (*Id. pp.* 308, 309).

They are all cases strictly within the law, and the reason of it, as inherited from the merchants and the law-givers of Rhodes, and strictly analogous to the simple example of jettison there given. The thing lost, or the damage sustained, is something *given* in time of peril for the safety of all.

The laws of Oleron which, by act of parliament, were adopted as part of the Admiralty law of England, declared as follows:

"Art. 8. If a ship departs from Bordeaux or elsewhere, and at sea is taken in a storm, and cannot escape without throwing out her merchandise, the master is bound to say to the merchants: 'Sirs, we cannot escape without throwing out the wine and the goods.' The merchants, if there are any who approve of the jettison, are to signify their assent; but if they do not agree, the master ought nevertheless not to tarry to throw over as much as shall seem to him good, swearing the third part of his companions on the Holy Gospels, when he shall have come safe to shore, that

he did it of no malice, but to save their lives, the ship, the cargo, and the wines.

"Art. 9. If the master of a ship must cut away his mast by reason of a storm, he should call the merchants and show them that it is fitting to cut away the mast to save the ship and the wares; and so, if cables or anchors must be cut to save the ship and the wares. They should be counted pound for pound like jettison; and the merchants should share and pay without delay before their goods are put out of the ship." (25. 316, 317)

In every new case or claim of general average the appeal has been made to these ancient laws, embodying its reason and its earliest examples, as to an unfailing test; and the allowance has been made or refused, as the case had, in the judgment of the court, those essential elements of a general average loss, so clearly shown and illustrated in the citations.

Three things are, by all the authorities, held essential:

1st. *The peril.* It must be imminent.

2d. *The sacrifice.* It must be voluntary, and it must be a sacrifice. It must consist in something *given*—something which the owner of it was not already by contract under obligation to devote to the purpose.

3d. *The community of benefit.* The right to contribution justly depends on the thing which is asked to contribute being in the peril sought to be averted.

If these things do not concur, there is no general average.

The extension of the doctrine in details from the case of jettison and of cutting away a mast or anchor, has been logical and consistent with these principles.

It is hardly necessary to point out the cases or their analogy.

(*a*) *Extraordinary expenses in the nature of salvage services.*

In *Kemp* v. *Halliday*, 34 L. J. (Q. B.) pp. 233, 242, it was held that where a ship, with cargo on board was submerged in deep water, so that it could not be got out without raising the ship, the cost of raising is general average, to which the cargo must contribute. And Mr. Justice Blackburn, in disposing of the case, says: "In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy; but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth had been thrown away. It is immaterial whether the ship owner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which got her off.

(*b*) *Voluntary stranding.*

Voluntary stranding had been long held to make a case of general average, where the ship was saved and prosecuted the voyage. And this court held, in *Columbian Ins. Co.* v. *Ashby* (13 Peters, 331, 343), that the case of voluntary stranding, when designed for the common safety, resulting in the saving of the cargo, but with the total loss of the ship, is also a case within the reason of the Rhodian law, and strictly analogous to the ancient precedents of jettison, cutting away the mast, ransom, and the rest.

In *McAndrews* v. *Thatcher*, 3 Wallace, 366, where the question was whether at the time the extraordinary expenses were incurred, the community of interest in the voyage remained between ship and cargo, or whether the cargo had been so completely separated from the ship and the voyage as to be no longer within the peril encountered or the benefit resulting from the expense incurred, this court says: "Natural justice requires that where two or more parties

are in a common sea risk, and one of them makes a sacrifice, or incurs extraordinary expenses for the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure; or, in other words, the owners of the other shares are bound to make contribution in the proportion of the value of their several interests.

Courts universally admit that the Rhodian law is the parent of maritime contribution, although, in terms, it made no provision for any case of general average, except for that of jettison of goods as the means of lightening the vessel. But the rule as there laid down has never been understood as being confined to that particular case, but has always been regarded as a general regulation applicable in all cases falling within the principle on which it is founded.

Principle of the rule is that, "what is given for the general benefit of all, shall be made good by the contribution of all;" and hence it is that losses which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo, are as clearly to be carried into the adjustment as those which arise from "sacrifices of part of the ship or part of the cargo."

It may safely be said that no court ever allowed a claim in general average, unless satisfied that these three elements were present in the case before it, one of the three elements essential being that the thing for which contribution was claimed, whether property or expenditure, was voluntarily *sacrificed* or *given*—not devoted or expended by the ship or the cargo, as the case may be, under its contract with the other interests.

II. Of the Rule in England.

In England, the wages and provisions of the crew dur- a detention for the repair of the ship, even when she is

compelled for the common safety to bear away to a port of refuge, are not general average.

Plummer v. *Wildman*, 3 M. & S. 482 (1815).
Power v. *Whitmore*, 4 M. & S. 141 (1815).
Hallett v. *Wigram*, 9 C. B. 580 (1850).

The grounds of the English rule are thus stated by Mr. Lowndes:

"In most countries, when the putting into a port of refuge in order to repair is treated as a general average act, giving a right to compensation, not alone for the bare cost of reaching a place of safety, but for all exper s incident to the remaining there and coming out again, the law recognizes as one of those expenses, the ship owner's loss from having to pay and feed the crew during this forced suspension of the voyage. In England it is not so."

"There are two reasons for the English rule. The first is, that the general average is terminated so soon as the port of refuge is reached, so that the expenses in question do not really form part of the cost of the general average operation, but of the delay in port in order to repair, which in the case at least of accidental damage, falls within the shipowner's duty under his contract. This reason does not apply when the damage which necessitated the bearing up was itself the result of a sacrifice for general safety. The second reason is based on the principle, that to constitute general average, an expenditure must be extraordinary in its kind, not the mere augmentation of an ordinary expenditure. The services of the crew during the whole voyage are due to the cargo, being, like the use of the ship itself, purchased by the engagement to pay freight. The ship owner must take the chance of a longer or shorter voyage."

Lowndes on Average, (2d ed.) *p.* 162.

The English rule is only important in showing how nice and close has been the argument as to whether the

bearing away to a port of refuge is not such a voluntary act outside of what the ship has undertaken to do, as to constitute that act, and all the expenses involved in it, fairly analogous to the case of a jettison, as a sacrifice for the common benefit; but in England the argument has prevailed, that as between ship and cargo, the voyage is to be regarded, even in this case, as one voyage within the purview of the contract, and so that the stipulated freight covers all the expense of wages and provisions.

But it is noticeable when the court is asked to extend the American rule, which is admitted to be different, to the new case of wages and provisions expended during a detention in the course of the voyage, and without any voluntary interruption of that voyage, that neither in the English courts nor by the foreign authorities appealed to, does it appear to have been ever suggested that without such an interruption of the voyage by a voyage of necessity to a port of refuge, there was the least possible doubt that the stipulated freight is a compensation for all expenses of wages and provisions, however long the ship may be delayed within the proper course of her voyage, as agreed by the charter or other contract.

III. Of the authority of the text-writers.

It is enough to say on this head that the writers on general average, without exception, *state* the rule for the allowance of wages and provisions in general average, with this limitation substantially, that *if a vessel bears away*, &c., they are then allowed.

Kent says (3 *Com.* 12 *ed.* 236): "So if a ship be injured by a peril of the sea, and obliged to go into port to refit, the wages and provisions of the crew during the detention constitute the subject of general average according to the decisions in New York and Massachusetts" (citing *Walden* v. *Le Roy* and *Padelford* v. *Boardman*, both cases of bearing away). "These decisions are supported by the rule as laid down in Beawes" (citing the familiar case of bearing away quoted above).

Phillips says (2 *Phillips on Ins.* § 1328), they are allowed "*during delay and departure from the course.*"

Parsons says (1 *Parsons Adm. & Shipping*, 385), these expenses are general average "from the time the vessel *bore away* to her port of repair."

IV. The American decisions.

A careful review of the American decisions is conclusive that the bearing away to a port of refuge, is alone the voluntary act which makes this sacrifice or extraordinary expenditure general average, for the reason stated above, in our first point, that this voluntary interruption of the voyage by a new, independent, interpolated voyage, not within the purview of the contract between ship and shipper, alone gives to these expenditures the character of a voluntary *giving* or *sacrifice*, which is essential to make them general average, and that this distinctive characteristic, of bearing away to a port of refuge, by which the statement of the rule has been always marked, is indeed that by which alone it can be reconciled with the admitted principle of the law of general average, and made analogous to a jettison.

The earliest case in the United States in which the question of wages and provisions as general average arose, appears to have been *Jones* v. *Ins. Co. of N. America*, 4 Dallas, 246 (1802), in which the Supreme Court of Pennsylvania decided unanimously that the wages and provisions during an embargo are not general average, but are recoverable as partial loss on a policy on the freight.

In *Kingston* v. *Girard*, 4 Dallas, 274 (1803), the same court refer to this decision as unanimous, and say that their opinion is strengthened by mature reflection. But they doubt whether the same expenses during a detention after *capture* would be governed by the same rule; "the principle of the other cases does not embrace it." "In the cases of embargo and quarantine the delay and expense are submitted to merely that the vessel may earn her freight."

Notwithstanding these rulings of the Supreme Court, the High Court of Errors, by a majority of votes, reversed the judgment in *Jones* v. *Ins. Co. of N. America*; *Ins. Co.* v. *Jones*, 2 Binney, 547.

This point, however, was not necessary to the decision. *Tilghman, C. J.*, giving the opinion of the court, says: "The criterion of general average is, were the expenses

necessarily and unavoidably incurred for the general safety of the ship and cargo? Although the decision of this point is not absolutely necessary at present, yet, as it may be useful to settle it by the highest judicial authority in the State, it has been thought proper to have it declared as an opinion of the majority of this court that the expenses incurred during the embargo should be brought into a general average." *Rush, President*, agrees with him on this point, on the supposed authority of Mr. Park and Lord Mansfield (p. 564) which proves, however, to be a mistake, as a study of the English cases shows. *Young, President*, dissents on the ground that these expenses are clearly chargeable on the freight and incurred for the purpose of earning the freight.

This case is important as being the first; but it illustrates the danger of extrajudicial opinions by courts of the highest authority; for the rule in case of an embargo has been conclusively settled against the opinions thus declared by the majority of the High Court of Errors, as will be presently seen.

But the distinction taken in these two cases between an embargo, which merely prolongs the voyage, and a capture which breaks it up—so that in one case the ship is but performing the service to the cargo that it undertook to perform in consideration of the freight, while in the other the expense is voluntarily incurred by the master, not being one which, by the contract, he owed to the cargo—is precisely the distinction between a detention in the course of the voyage to repair the ship, and a bearing away to a port of refuge, a new and voluntary voyage not within the purview of the contract between ship and cargo.

The next case is that of *Leavenworth* v. *Delafield*, 1 Caines Cases, 574 (1804). This was a case of capture. The vessel was bound from New York to Havre de Grace. She was captured in the British Channel, and carried into Ramsgate. She was afterwards liberated and arrived safely. It was *held* that the wages and provisions while she was under arrest at Ramsgate were general average.

Livingston, J., refers to the fact that the crew, instead of being discharged, were kept together to preserve the property and navigate the ship, if the efforts to release her were successful. He says, citing Beawes: "'If a ship be taken by force and carried into some port, and the men remain on board to take care of and reclaim her, the wages and expenses of the ship's company during the arrest shall be brought into general average.' For this rule the author just cited assigns this very obvious reason: 'As the crew remained on board during an endeavor to reclaim her, these expenses were occasioned with the sole view of preserving the ship and cargo for their proprietors.' In England it is settled that if a ship be obliged to put into port to repair, and this be necessary for the safety of all, the charges of unloading, reloading, and taking care of the cargo, and also the wages and provisions of the workmen hired to repair her become a general average. * * In France the extra wages of a crew, when a vessel puts into port and remains there to avoid an enemy, are a gross average, 1 Emerigon, 556. The same author informs us that all *bona fide* expenses to obtain the release of a vessel become a general average if the property be released; and after quoting the same passage from Ricard, which has been cited from Beawes, he observes that in France the question has uniformly been thus decided whenever it occurred." (p. 577.)

Nothing could be clearer than that the ground of this decision is that the expense of wages and provisions in case of capture, is an expense voluntarily incurred by the ship, which, under its contract with the shipper, it was not bound to incur for the common benefit to avert a common peril. And the decision is entirely consistent with the general principle.

The next case is *Walden* v. *Le Roy*, 2 Caines' Cases, 263 (1805). The case was assumpsit by the plaintiffs, owners of ship Thomas, for a general average for wages and provisions, incurred and expended from the time of bearing away to Norfolk in consequence of a leak

of uniformity, the latter should be followed, unless manifestly incorrect. * * * There is an evident distinction between a detention by capture and an embargo. In the former case the charter party is dissolved, and the captain (who is generally agent of all parties to act for the best under every misfortune) reclaims both vessel and cargo, and, without being under contract or obliged so to do, retains the crew for the purpose of preventing an *entire* loss and pursuing the voyage if the property be acquitted; whereas he might dismiss them at once, and the underwriter be called on for a total loss. The expenses therefore incurred by a claim of this nature, being evidently for the general benefit, if not impliedly at the general request, and not the effect of previous stipulation or contract, which is at an end by the capture, it is but reasonable they should be defrayed in the same way." * * *

He then shows that an embargo merely delays and lengthens the voyage, but does not interrupt or break it up.

Padelford v. *Boardman*, 4 Mass. 548 (1808), was the case of a vessel bound from Cape de Verde Islands to Rhode Island, so damaged by a storm at sea that she was obliged to put into Norfolk to repair, and the question was whether the wages and provisions during the detention at Norfolk were general average. Held that they were. Sewall, J., says (p. 551), "Considering the general average the only loss recoverable in this case, it becomes important to ascertain the items to be allowed in estimating it; or, rather, whether the wages and provisions of the crew, during the detention from the usual course of the voyage are proper items in the general average. It is understood that merchants and insurers are not agreed upon this question, and that it is not determined by uniform usage and practice.

The rules of insurance admitted with us, chiefly in conformity to English decisions, have determined that extraordinary expenses incurred during the course of a voyage, or an unavoidable detention from an accident that interrupts it, are charges and losses upon freight and profits of the

voyage, and are not recoverable against an insurer upon the ship or her lading, and upon this general principle, that every loss is to be referred to its immediate occasion and subject-matter. The expenses of a detention are no direct diminution of the value, and are, therefore, not recoverable against the insurer of the vessel; but they diminish the value, and are therefore recoverable against the insurer of the freight. Thus in *Fletcher* v. *Poole*, before Lord Mansfield, the wages and provisions expended during a detention to repair in a port to which the vessel had been driven by distress of weather, were held not recoverable against an insurer on the vessel. And in *Eden* v. *Poole*, before Justice Buller, a loss by wages, provisions and demurrage, during a detention in a port to which the master bore away in consequence of distress of weather and the threatenings of the crew, were held not recoverable on a policy on ship and goods.

"*Both these cases exclude the circumstance of a voluntary and deliberate resort to a port for the particular purpose of refitting, with a view to the common safety of the vessel and cargo, and to avoid the impending danger of continuing the voyage without some necessary repairs.*"

"In *Da Costa* v. *Newnham*, the ship insured, having met with an accident in the course of her voyage from Leghorn to London, was obliged to put into Nice to repair. Justice Buller considered this a case of general average, and the insurers upon the ship were holden liable, in this view among others, for the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs; the ship having been obliged to go into port for the general benefit of the whole concern. The crew had been discharged, and therefore it was not necessary in that case to decide the precise question whether their wages and provisions were recoverable in a case of general average. And upon this particular question there seems to be no complete authority from any adjudged case in the English reports.

"Magens enumerates the expenses and damages which,

according to the ordinance of Hamburgh and some other foreign ordinances, constitute and are commonly accounted a general or gross average; among which are extraordinary pilotage and charges which a ship shall be at from springing a leak, or being obliged to take shelter in a harbor, by having received some other damage. Included in this article are sailors' victuals and wages; and upon this subject Magens cites Langenbeck's annotations, and with him distinguishes a detention occurring in the course of the voyage, or by an accident which immediately interrupts it, which he instances in the case of a ship accidentally surprised and frozen up at Petersburgh by an unexpected frost, when sailors' wages and victualing during the detention are not to be made good by a general average, but are to be borne by the ship alone. And a like detention happening when the master after sailing, had, in consequence of damage received in a storm, found it necessary and determined to seek a proper place to repair, where he was afterwards frozen up; in such case the expense of victuals and wages are to be admitted in general average.

"Beawes lays it down as an established principle and usage, that where a ship is forced to enter a port, to repair the damage she has suffered in a storm, being unable to continue her voyage without apparent risk of being lost, that in such case the wages and provisions for the crew, from the day it was resolved to seek a port to refit the vessel to the day of her departure from thence, with all the charges of unloading and reloading, anchorage, pilotage, and every other expense incurred by this necessity, shall be brought into a general average."

"A detention in consequence of a master's seeking a port to avoid an enemy, is mentioned by Bynkershoek as a case of general average in which sailors' wages and provisions were allowed by the decisions of the several courts of Holland."

After citing these foreign authorities, the learned judge says: "A liberal construction in this respect appears conducive to the interest of insurers, in the benefit they derive

from any reasonable precaution against impending and extraordinary risks, such as the continuing at sea with a vessel disabled in her sails and rigging. By rendering the concerned liable in a general contribution to defray the extraordinary expenses of seeking a port, and of the detention there to refit, the hazard from opposing interests is avoided, and a security common to all the concerned is purchased, as it ought to be at their common risk and expense."

And he concludes the whole matter as follows: "*In the case at bar, the seeking the port of Norfolk to refit, and the stay there, are agreed to have been a deliberate and necessary departure and detention from the course of the voyage, for the benefit of all concerned. This was, therefore, a case of general average, and the sailors' wages and provisions forming suitable items of the expenses thereby incurred, are to be allowed.*"

It would be difficult to choose language more precisely marking the reason on which a decision rests than these words. Because the master's act in seeking the port of refuge, and in staying there, was a voluntary and deliberate departure from the voyage on which the ship had sailed, and for which it agreed to furnish wages and provisions; *therefore* it was a case of general average.

The distinctions taken by the foreign writers cited also show that the learned court had clearly in mind, as the test of general average, a departure from the stipulated voyage as distinguished from a mere detention in the course of that voyage.

In *Wightman* v. *Macadam*, 2 Brevard (So. Car.) 230 (1808), a vessel sailed from Havana to Charleston, and being in distress, put into Savannah, where the cargo was delivered to the shipper, he paying freight *pro rata*. She was detained there for repairs, and the wages and provisions of the sailors during the detention were disallowed, apparently because the cargo was not at risk, having been delivered. Grunke, J., delivered the opinion: "The principle laid down by the court was, that whatever charges are necessarily incurred, *where a vessel is compelled to seek refuge from tempest in a*

port out of the course or short of her port of destination, for the mutual safety of the ship and cargo, the owners of each are respectively bound to contribute in proportion to their several interests. * * * The other charges, including claim for wages and provisions, do not appear to be at all necessary to the safety of the goods, and therefore the defendant is not liable to contribute to the payment."

In *Ross* v. *Ship Active*, 2 Wash. C. C. 226 (1808), a claim was made to include wages and provisions in general average. Bound on a voyage from Canton to Philadelphia, the ship put in to the Isle of France for water and provisions. There it was discovered that she was unseaworthy and needed repairs. Being detained for this purpose, this claim was made. It was obviously not a case for general average. Washington, J., said (p. 241): "The next question is, are the expenses incurred at the Isle of France to be considered as a subject of general or partial average? The great and leading rule respecting this subject is, that all persons benefited by an act of the master, with a view to the general safety of all, in cases of extraordinary necessity or peril, must contribute to the loss in proportion to the property saved by the act. The act must not only be performed with this view, but it must be in a case of emergency not produced by the misconduct or unskillfulness of the master or commander, and not resulting from the ordinary circumstances of the voyage; as, if goods be thrown overboard in a storm to lighten the vessel and insure her safety; if injuries be done to a vessel for a similar purpose, or expenses be incurred in repairing a damage done to the vessel by the violence of the winds; to avoid the pursuit of enemies or pirates, and in many other cases of the like nature. But if the damages to the ship arise from the ordinary occurrences of the voyage, and not from extraordinary violence or peril to which she has been exposed, the loss must be borne by the owner of the vessel, who engages by his contract with the freighter that she shall be stout, staunch, and strong, and properly equipped for the voyage; and whether it be expressly stipulated or not, he is bound to keep the vessel in this condi-

tion during the voyage, unless prevented by some extraordinary peril, for which he can in no respect be responsible."

The learned judge, in these definitions of general average, was dealing with those elements of a general average in which the case before him was wanting. There was no extraordinary peril to be avoided. It was a mere case of a ship becoming, by age and wear and tear, unseaworthy. The case did not call for a definition that touches this case.

The next case, *McBride* v. *Marine Ins. Co.* 7 Johns. 431 (1811), was a case of embargo, and the court adhered to the rule, as laid down in *Penny* v. *N. Y. Ins. Co.* 3 Caines' Cases, 155 (*ut supra*), and in the opinion the court uses this language: "The wages of the crew during the detention of the ship by the embargo, and until they were discharged, were not covered by the policy on the ship. They do not even go into a general average, but fall exclusively upon the freight."

"As the sovereign who lays the embargo," says *Ricard*, "does not claim the ship or cargo, but only detains them, it cannot be said that the crew remain on board to prevent an entire loss. *The crew, says Pothier, are maintained during the detention at the exclusive expense of the owner; for he owes their services to the shipper for the voyage, and the price of their service is embraced in the freight.*"

Barker v. *Phœnix Ins. Co.* 8 Johns. 307 (1811), reaffirms *Walden* v. *LeRoy*. It was the case of a vessel forced to seek a port of refuge out of the course of her voyage. It was contended that the embargo cases had overruled *Walden* v. *LeRoy* (p. 312). But the court held the point settled by *Walden* v. *LeRoy*, and that there might be no doubt as to the ground of the decision, Kent, C. J., says, "*that the ship was driven into Copenhagen by the perils of the sea, is conclusively shown*" (p. 319).

In *Dunham* v. *Commercial Ins. Co.* 11 Johns. 315 (1814), a vessel bound from New York to Liverpool, and

thence back to New York, with a cargo for Liverpool, was so injured by storms on her outward voyage, that on her arrival at Liverpool, after delivering her cargo, she was docked for repairs. In an action on a policy on the ship, it was claimed that the wages and provisions of the crew during the detention at Liverpool, were general average. The claim was disallowed upon the very obvious ground that the cargo, being delivered, and the expenses not having been incurred for the benefit of the cargo, but for the ship alone, were not general average.

This case has been supposed to sustain the judgment in the case at bar, because the court do not say that the claim cannot be sustained because Liverpool was not a port of refuge. The weakness of this argument is obvious. There was another complete answer, that given by the court, that the cargo was delivered and the freight earned before the expenses were incurred. One good reason was enough. There was no occasion to give another, and no inference can in such case be drawn from the silence of the court adversely to the opinions before clearly expressed by the same court on this subject.

Spafford v. *Dodge* 14 Mass. 66 (1817), was a case of capture. The vessel was seized, carried into port, and detained four months, and then acquitted, restored to the master, and the voyage was completed. The court *held* that a capture not followed by condemnation did not dissolve the contract of the mariners, and on this ground declined to follow *Leavenworth* v. *Delafield*, 1 Caines' Cases, 573, and disallowed the claim of wages and provisions as general average. *The test applied clearly was whether the manning and victualing of the ship during the detention, were within the contract and obligation of the ship, compensated by the freight; if so, the loss fell on the ship alone. If not, but voluntarily furnished by the master to avert a common danger, not being obliged thereto by the contract between ship and shipper, they would be general average.* Jackson, J. (p. 74.) "As to the wages and provisions of

the crew during the detention, we are unable, notwithstanding the very respectable authorities cited in support of this claim, to see any ground on which we can allow it, consistently with the established principles on this subject, and the course of the decisions in this State.

"*The only case in which this charge has been allowed, in an account of a general average, in our courts, was where it was necessary to go into port to repair damages sustained during the voyage from perils of the sea; and the master, for that reason, voluntarily sought a port to refit*" (citing *Padelford* v. *Boardman*, 4 Mass. 548). "*Here, it is to be observed, the delay was voluntarily incurred by the master; the mind and agency of man were employed in producing it; and this circumstance is deemed essential in every case of general average, in contradistinction to such unavoidable detentions and losses as arise from accident beyond the control of the master.*

"We see no ground of distinction, in this respect, between a temporary detention, occasioned by a hostile seizure, and one which is occasioned by an embargo, or by a tempest, or other common peril of the sea. *If upon such a seizure the contract for wages were dissolved, and the mariners discharged from all further duty on board the ship, and if they afterwards remained under a new contract with the master, express or implied, to assist in reclaiming the ship and cargo for the respective owners, the compensation due to them for that service would be justly brought into an account of general average. It would then be an expense voluntarily incurred by the master, for the benefit of all concerned in the adventure. It is upon this ground that the wages and provisions of the crew, in such a case, have been allowed as general average in the Supreme Court of New York*" (citing *Leavenworth* v. *Delafield*).

It is wholly immaterial which court was right as to the effect of a capture on the charter party and the contract of the mariners. There is no difference between them as to the principle upon which the question of allowing wages and

provisions in general average is determined. If they are furnished under the ship's contract or obligation, they are not allowable. If they are *voluntarily given*, not being due by the contract, they are allowed. And both courts further agree that when the master, to avert a common peril, voluntarily undertakes a voyage to a port of refuge to repair damages, he does *give* that voyage and its entire expense, as a thing outside of the ship's contract for the common benefit.

Thornton v. *Ins. Co.* 3 Fairfield, 150 (1835), was the case of a vessel compelled to put into a port out of the course of her voyage, for the preservation of the ship, the cargo and lives of the crew, and it was held to be the settled rule of law in the United States, that *in such a case*, the wages and provisions *from the time of bearing away till her departure from the port, were general average.*

Hause v. *New Orleans Ins. Co.* 10 La. (O. S.) 1 (1830), was the case of a steamboat, bound from Mobile to New Orleans, and her machinery having become disabled in a storm, she put into Biloxie, to repair. It was strictly a case of departure from the voyage, and it was held chiefly on the authority of *Padelford* v. *Boardman*, that the wages and provisions, from the time of bearing away and during the detention, were general average. Porter, J. "The law merchant of the United States is contrary to that of England, on this point. With us it appears well settled that the wages and provisions of the crew, *from the time of putting away for the port, and every other expense necessarily incurred during the detention*, for the benefit of all concerned, are subjects of general average. The reasoning of Justice Sewall, in delivering the opinion of the Supreme Court of Massachusetts, appears to us to express with clearness and correctness the grounds on which such a rule has been established."

Potter v. *Ocean Ins. Co.* 3 Sumner, 27 (1837), is the first reported case in which the point now in question was directly decided. It was an action on a policy on the bark Hannah. She sailed from New Orleans to Tampico

with a cargo, and met with sea damage on the voyage. The cargo was delivered at Tampico, but as the necessary repairs could not be made there, she sailed for New Orleans, and was there repaired, and the question was, whether the wages and provisions on the voyage to, and during the detention at New Orleans, were general average. The crew were shipped "from New Orleans to Tampico, and from thence back to a port of discharge in the United States." It became a question of fact, whether the vessel, in the due course of her voyage, would have returned to New Orleans, and *Judge Story instructed the jury, "that if they were of opinion that the return to New Orleans was in the regular course of the voyage, then their verdict on this point ought to be for the defendants;—if, on the contrary, it was a new voyage of necessity for repairs, then their verdict on that point ought to be for the plaintiff." This was a direct decision of the point, as a departure from the regular course of the voyage, to a port of refuge, was made the test of the liability to these expenses in general average.*

The jury having found for the plaintiff, the defendant's counsel still insisted (p. 32) that they were not liable, because a pending voyage was not interrupted to seek a port of necessity, and that the vessel would probably have gone to New Orleans had she not needed repairs, as the shipping articles provided only for a return to a port of discharge, in the United States; and on this objection Judge Story, said: "In respect to the leading objection that has been taken to the report that it allows the expenses of wages, provisions, &c., of a voyage back to New Orleans, as in the nature of a general average, *the jury have found that the voyage was a voyage of necessity for repairs, to a proper and convenient port. According to the established doctrine in the Massachusetts courts, the wages and provisions of the crew and other expenses, on such a voyage of necessity, constitute a general average.*"

Bixby v. *Franklin Ins. Co.*, (Mass. Supreme Court, 1828), cited in note to the case of *Potter* v. *Ocean Ins.*

Co., 3 Sumner, 46, was a similar case. The voyage was from Boston to a port or ports in the Island of St. Domingo, and thence to her port of discharge in the United States. She sailed for the Island of St. Domingo, though for what particular port does not appear. Being injured by a storm, she bore up for the first convenient port, and first made St. Paix, in the Island of St. Domingo. Finding it impracticable to make repairs there, or at any other port at which she touched, she went into Maragaone. Having discharged her cargo and made some temporary repairs, she proceeded in ballast to Wilmington, North Carolina, where thorough repairs were made, and returned with a cargo to Maragaone, and took in her return cargo and came back to Boston. It was made a question of fact in this case, whether the going into Maragaone was in the regular and projected course of the voyage, and the result of the case is thus stated by the reporter: "From a memorandum on the back of the report, in the handwriting of the late Mr. Chief Justice Parker, the final opinion of the court was in favor of the plaintiff, *for the allowance of the wages and provisions, in going to the first and second ports of necessity.* * * * The memorandum is in these words: 'We are of opinion that only so much of the damages found by the assessor as relate to the expense at Maragaone, from thence to Wilmington, and at Wilmington until the crew were discharged, can be allowed. That from thence, the vessel began a new voyage, *instead of resuming the voyage, from which she was driven by necessity.* If the plaintiff is content with this, he may have judgment; otherwise the cause must remain for argument.' The parties (it is understood), acquiesced in this opinion."

Although the report of this case is somewhat confused, yet it is evident, not only from the Judge's memorandum, but also from the reporter's comment, *that Maragaone was held to be a port of necessity*, and that this controlled and justified the allowance. It is evident that the principal fact disputed on the trial was, whether the vessel went there in the course of the voyage or by necessity. The

fact that she landed her cargo there was evidently inconclusive, as she was not fit to carry it away, and had to go elsewhere for necessary repairs.

Giles v. *Eagle Ins. Co.*, 2 Metcalf, 40 (1840), was the case of a fisherman. She put into a harbor expecting a storm, and while there she dragged her anchors and got ashore. The crew were not discharged, but boarded on shore, and other workmen were employed to help get her off. The expense of the other workmen was held general average ; *the wages and provisions of the sailors not.* There was here no voluntary departure from the voyage to avoid an impending peril. The peril which detained the vessel and made the expense necessary was the stranding of the vessel. The service rendered to rescue her from this peril being in the nature of salvage, was properly held to be general average; but the mere lengthening of the voyage by detention at a port to which she had gone before she was subject to this peril, was held no ground for making the wages and provisions general average. It should be observed that the vessel did not bear away to go into the port in distress. She may be said to have gone in the course of her voyage. Being a fisherman, not on a definite voyage, she went where it was convenient for her to avoid an apprehended storm.

This case is, therefore, entirely consistent with the other Massachusetts cases, and with *Potter* v. *Ocean Ins. Co.*

The Brig Mary, 1 Sprague's Decisions, 17 (1842), decided by Judge Sprague, was the case of a vessel in distress at sea departing from the course of her voyage to a port to repair. *Sprague, J.* "The questions which have been presented in this case relate to the adjustment of general average. First, from what time is the allowance for wages and provisions to commence? *It is admitted to be the general rule that it is from the time when a vessel in distress alters her course to seek a place of safety.*"

The latest case seems to be that of *The Star of Hope*, 9 Wall. 203 (1869), decided by this court. It was clearly a case of departure from the course of the voyage, and

among the items of general average claimed were the wages and provisions of the crew, as to which your honors say: "The wages and provisions of the master, officers and crew, are general average from the time the disaster occurs until the ship resumes her voyage, if proper diligence is employed in making the repairs."

Besides these judicial decisions on the point in question, there are judicial dicta to the same effect where the point was referred to incidentally, and by way of illustration. Judge Story in *Peters* v. *Warren Ins. Co.*, 3 Sumner, 400 (1838), says: "*We all know that when a ship is obliged to put away to a port of necessity, by losses or injuries in a storm, which constitute a general average, the wages and provisions and other expenses of the crew to and at the port of necessity constitute a part of the general average.*"

V. Result of the decisions.

This review of the authorities shows conclusively that the departure from the course of the voyage to seek a place of safety has been always insisted on by all the courts before which the question has come, as an essential element in the general average.

It cannot be accidental that the rule is thus in its statement always limited in every case where the general average has been allowed. This limitation in the statement of the rule is a recognition of the fact by all these courts that on no other theory than that the vessel in departing from her regular and projected voyage *has entered upon a new voyage for the common benefit and to avert a common peril*, can there be said to be any wages and provisions *given* or *sacrificed* for the common benefit, the wages and provisions in the regular and projected course of the voyage, however prolonged, being within the ship's contract, and so in no sense given or sacrificed for the common benefit.

But, besides this general recognition of the limitation, and the reason of it in all the cases where general average

has been allowed, we have the great authority of Judge Story in *Potter* v. *Ocean Ins. Co.*, where, in instructing the jury, he distinctly held that without a departure from the course of the voyage, the wages and provisions were not general average.

When we consider the situation of a disabled ship at sea exposed to the fury of a tempest, or to the imminent danger of foundering if she persists in keeping on her course, we can appreciate the sound reason for treating the deliberate act of the master in seeking a port of refuge as a sacrifice for the common benefit. And one of the reasons given in support of the principle in the foregoing decisions is that the master who represents the owners, knowing that such an act is not wholly at the cost of the ship, may be thereby under additional inducement to take this step, when it is clearly proper, rather than to struggle on with an unseaworthy ship to his port of destination, as he might be tempted to do if the whole expense was to fall on his owners.

This consideration has doubtless had its influence in establishing the rule, and it has no application to a ship arriving disabled at its port of destination, or to a ship injured in a port in the course of her voyage.

The perils that must threaten a ship and cargo, to give rise to a general average, must be real dangers, not fanciful ones. And it may well be doubted whether a ship safely in port can be said to be so threatened by imminent peril by the possible effects of the injuries she has received, as to supply that essential element of a case of general average—the peril. *It is the great and well understood perils of the sea that the marine law deals with and provides for.*

The peril suggested in this case is not any danger of physical destruction that threatened the ship and cargo, but the somewhat fanciful one of the danger, if the ship was not repaired, that the voyage or adventure might be broken up.

We suppose that a danger of this character, one threatening not physical destruction, but the loss or abandonment

of the adventure may be the basis of a general average sacrifice.

Thus if a ship with a valuable cargo, heavily laden but not unseaworthy, sails for the Baltic, and the chief value of the cargo depends on her reaching her destination before navigation is closed by the ice, and she sails in ample season according to the usual course of the wind and weather, but by a long succession of storms she is impeded and driven from her course, and now can in all human probability only reach her destination by throwing over a part of her cargo to lighten the ship and increase her speed, and a part of her cargo is jettisoned for this purpose, and she thereby is enabled to reach her destination, this would, we should think, be a case of general average within the principle of the Rhodian law.

So if, instead of a jettison, the master hires a tug for the same purpose and with a like result, the expense of the tug would be general average.

And so if, instead of being bound to a port likely to be closed by ice, she is bound to a port which is certain to be blockaded by a certain day, the same sacrifice would be equally general average.

These hypothetical cases which probably never happened and, perhaps, will never happen, yet seem to present all the elements of a general average. The thing sacrificed, or expense incurred, is a thing *given* not bargained for and sold at a price paid.

And if the peril in the case at bar is sufficiently real and within the range of a general average peril to justify the application of the rule on the ground that the voyage or adventure was at risk, the question still remains whether a shipowner is not bound by the contract of affreightment to make the repairs, remove this very cause of danger, and continue the voyage in case the ship can be repaired, and is not wrecked or so seriously injured as not to be worth repairing.

If this is the duty of the shipowner to the cargo by the maritime law, then there is no sacrifice, because the ship-

owner is only discharging his contract by making the re pairs, and he has, therefore, sacrificed nothing.

It has been held that this is the duty of the ship, and that the exception in the bill of lading, "unless prevented by the perils of the sea," only excuses the shipowner from that duty when the ship is wrecked, or so badly hurt as not to be worth the cost of repairing. *Moss* v. *Smith*, 9 C. B. 94; and see *McAndrews* v. *Thatcher*, 3 Wall. 371.

The danger, therefore, to which ship and cargo are exposed of losing the voyage or adventure where not physically in peril, is simply the danger of the shipowner not discharging his duty to the cargo. And there is an obvious injustice in imposing on the cargo any expense incident to making the repairs, unless there is some other peril than this threatening the ship and cargo, or voyage, which will supply that necessary element for a general average loss.

This, therefore, is the basis of a substantial distinction between the case of a vessel putting away for a port of refuge when exposed to a real and present peril at sea, and a vessel in a damaged condition in a port in the course of the voyage.

Not only is the latter still on the very voyage for the wages and provisions of which, however long, the freight is the stipulated compensation, but she is exposed to no peril except one which the shipowner has contracted to protect the cargo against, namely, the loss of the voyage through the unseaworthiness of the ship.

VI. The opposing authorities.

Against this great weight of authority the defendant in error relies on the case of *Nelson* v. *Belmont*, 21 N. Y. 36, the opinion of *Mr. Southmayd* in the case of *The Clytie*, and a supposed *dictum in his favor in Phillips on Insurance.*

(*a*) *Nelson* v. *Belmont*, 21 N. Y. 36. This was simply a question whether that community of interest exists between the ship and cargo after the cargo was physically

separated from the ship, as to make the cargo liable in general average for extraordinary expenses incurred in getting the ship out of its peril, and it was held that so long as the cargo is still under the control of the master and attached to the adventure, it was liable.

It was not a case of wages and provisions. It was not a question whether the expenses were extraordinary or not. They clearly were, being salvage expenses. The court had no occasion to define exhaustively a general average loss, except in relation to what constitutes the community of peril. And in defining the requisite community of peril, they, of course, had to determine the nature of the peril that will subject a cargo to general average, and they held that although the cargo be not in physical peril, yet as ship and cargo are engaged in one adventure, and along with the physical peril to which the ship is exposed, and as a consequence of it, is the peril of the loss of the adventure, affecting both ship and cargo, and threatening them both with more or less injury and loss of value, that the cargo should be held to be exposed to the peril, and so should contribute. The case did not introduce into the law of general average anything new, unless it be that it brought out more clearly than before that the peril essential to a general average need not be a merely physical peril, but a peril to the voyage, which principle is conceded and illustrated above. The case certainly did not dispense with any of the familiar and recognized essential elements of a general average, and has really no bearing on the argument of the present case. That the case is not to be understood as dispensing with the essential element of a *sacrifice*, a *giving* of something that the party offering has a right to withhold, is plainly seen by the approval which the court gives to the decision in the case of *McAndrews* v. *Thatcher*, 3 Wall. 376, while the very same opinion reiterates the absolute necessity of all the essential elements of general average (p. 367, cited above).

(*b*) The opinion of Mr. Southmayd in the *Case of The Clytie* (1873).

The Clytie, lying in port of Manila, injured by collision when nearly loaded. Detained several months for repairs. Question whether the wages and provisions during detention are general average.

The case was submitted not in the course of litigation, but by consent of the parties interested, to Mr. Southmayd, without argument of counsel.

His opinion was given in favor of the claim and was cited on the trial. He does not advert to the fact that there is any authority or decided case to the contrary, and though he cites *Potter* v. *Ocean Ins. Co.* for other purposes, he takes no notice of the circumstance that that case was a positive and direct decision of Judge Story to the contrary; and he argues the question as if there were no authority on the point whatever, and evidently under the impression that the case is a novel one, to be determined wholly by analogy, and the application of the general principles of the law of general average and insurance. He begins by citing the admitted rule, that where a vessel bears away to a port of refuge, the wages and provisions are a general average from the time of bearing away till the vessel returns to the course of the voyage; and as an illustration of that rule, supposes the case of the Clytie, having met with the disaster an hour after having sailed, then having put back to Manila; in which case, by the conceded rule, the wages and provisions from the time of turning back, and during the detention, would be general average.

He then states that the rule as to these expenses of detention for repairs is merely an application of the general principle underlying the whole doctrine of general average, "that where several subjects are involved in community of risk, they shall all contribute to the sacrifices and expense requisite to avert the peril, and the cargo is considered to be at risk *whenever the voyage upon which it is shipped is*

at risk, although it may not be in peril otherwise of physical destruction or injury."

He then says, that on no other principle that he can see will a part of the cargo, taken out of the ship and out of the danger, be held to contribute to the expense of averting the peril to which the ship and the rest of the cargo is exposed; and cites the case of *Nelson* v. *Belmont*, 21 N. Y. 36, and quotes the opinion of Judge Selden that "whatever threatens the voyage is a peril to the entire property," inasmuch as the value even of the part removed from the ship "depends, at least is supposed to depend, in some degree, upon the successful prosecution of the voyage."

He then points out the well established rule of law, that the ship has a vested interest or right to insist on carrying the cargo to the end of the voyage; and the resulting rule, that the owner of the cargo cannot repossess himself of it without paying the freight, even if the ship is detained for repairs.

He then discusses the question, whether the bearing away to a port of distress is the true ground on which in the adjudged cases the wages and provisions have been held to be general average.

And to test the question, he asks, "If that is the sole ground of the allowance, why should not the allowance cease upon reaching the port of refuge? Why continue it during the detention for repairs? Especially why should it be so continued where the port of refuge is the port of departure?"

These questions show very clearly that for the moment he overlooked the very ground on which the cases have proceeded.

The answer to the questions is perfectly obvious. From the time of bearing away during the detention, and till the ship is again on the true course of her original voyage, which has been interrupted, the ship is on a new, a different, an interpolated voyage, voluntarily undertaken by the master outside and wholly independent of what the ship

agreed to do by the charter party or the contract of affreightment. The expense of this new voyage is just as clearly a sacrifice voluntarily made for the common benefit, and to avert the common peril, as a jettison, out of which clearly grew this whole doctrine of general average. That is why the time of the detention is included. It is all part of the new and interpolated voyage, not in the charter party, nor within the contract of the parties. And it makes no difference that the port of refuge is the original port of departure. When the ship left that port she had fully discharged her duty as to that port. She was no more bound to go back than she was to go to any other port not in the course of her voyage; and if, therefore, she returns to it as a port of refuge, she is just as truly upon a new voyage in going there, and while she remains there and till she gets back to the point where she bore away to return, as if she had gone into any other port.

Mr. Southmayd not seeing the answer to those questions, of course concluded that the mere bearing away was an immaterial circumstance, and a distinction without a difference, and he looks elsewhere for some principle to justify the allowance during the detention.

He says: "The true basis of the allowance for wages and provisions during the period of detention in the port of refuge for making the repairs, appears to me to be *the common interest of the ship and cargo in having the vessel restored to a condition in which she may resume the voyage and prosecute it to its termination.*"

The answer is, that where there is no departure from the course of the voyage, no "interruption" of it, in the language of the cases, the voyage is merely lengthened by the accident. And in computing the freight for that voyage, the owner of the ship took into account, or is to be supposed to have taken into account, the chances of that voyage being longer or shorter. If it proves unexpectedly short, it is his good fortune, and the charterer cannot make any deduction from the freight on that account. If it

proves unexpectedly long, the shipowner must bear it, and cannot increase his stipulated freight.

The distinction here made is logical, consistent with the doctrine of general average as applied to jettisons, out of which the doctrine grew, and as applied to voluntary strandings, to cases of capture, and embargo, recognizes and enforces and preserves intact the contract between the parties.

To abandon the distinction, and base the allowance of wages and provisions "merely on the *common interest of the ship and cargo in having the ship in a condition in which she may resume the voyage and prosecute it to its termination*," is to do violence to the contract between the parties, to release the ship from a part of her obligation under the charter, of manning and victualing the ship *upon that voyage*. It is to leave out of the case one of the essential elements of a general average as declared for ages—the essential element of a voluntary sacrifice—the voluntary doing of something involving destruction of value or expense, which the ship was not by the contract and within the meaning of the parties bound to do.

If this common interest to restore the ship and continue the voyage, is alone and without regard to whether the thing done to that end is a thing stipulated by the ship to be done, is a sufficient basis for a general average, then, logically, all the expense of the repairs, though permanent in their character, should equally be general average, as well as all the expenses of delays for repairs, however slight and wherever made.

(*c*) The case of the two carpenters, cited by Mr. Phillips.

Mr. Phillips says (2 Phil. Ins. § 1328), "a vessel bound on a voyage from Smyrna to Boston, met with sea damage, to repair which, she took on board two carpenters from a public ship, and delayed a few days at sea to make repairs, instead of putting into port for that purpose. The under-

writers in Boston made no objection to paying the expenses of this delay.

"Such a case is not at all distinguishable from going off the course to seek a port of necessity."

It must be conceded that this voluntary action of Boston underwriters is no great authority. And it does not appear that any wages and provisions were paid, or anything but the wages of the two carpenters. It does not appear whether the repairs were temporary or permanent; but it is obvious that Mr. Phillips approves this allowance on the ground that it was *a delay at sea of a disabled ship.* A ship in that position is subject to a very certain and pressing danger from a storm arising before she can get the damage repaired, to which a vessel in port is not subject, and Mr. Phillips puts the justice of the allowance on this ground, for he uses the case as an illustration of this proposition: "Extraordinary delay at sea for the purpose of making repairs is a subject of average." A proposition for which he cites no other authority, but which we need not quarrel with, but which, perhaps, is open to argument if it shall arise. As to the pay of the two carpenters, it can well be approved as an extraordinary expense incurred for the common benefit, especially if the repairs were temporary.

SECOND POINT.

IT WAS NO DEPARTURE FROM THE COURSE OF THE VOYAGE, TO HAUL THE VESSEL TO THE STORESHIP FOR THE DISCHARGE OF HER CARGO, OR FROM THERE TO THE DRY DOCK TO BE REPAIRED, OR BACK AGAIN TO THE HULK TO RECEIVE HER CARGO.

All these places were within the port and bay of Callao (fols. 21, 22). During all the time she was *at Callao* within the meaning of the charter party.

The learned judge properly disposed of this point below, in these words: "But I am not disposed to place the decision upon any mere technical deviation from a lengthening of her voyage. Callao was an intermediate port to which the vessel was bound. She anchored within the lines or boundaries of the port. There it was discovered that she must be extensively repaired, and she was accordingly moved to a point in the port where repairs could conveniently be made. If the rule for which the defendants contend is the correct one, I am not inclined to evade it by any technical deviation of a couple of miles made within the limits of an intermediate port where the vessel is bound" (fols. 45, 46).

A port is a single place—a unit in the apprehension of the law, and within the meaning of commercial instruments.

If any such distinction as is contended for in this respect be admitted between one and another part of a port, it would introduce endless confusion and refinements into the law of insurance.

There is no authority or precedent justifying the distinction.

Vessels can very seldom be repaired at their first anchorage, and for the purpose of repair they are necessarily moved about in port more or less as this vessel was. If such moving about be a departure from the voyage, then the whole discussion of the question of departure in the books and by the courts, has been useless.

THIRD POINT.

WHATEVER MAY BE THE GENERAL RULE, YET, UNDER THIS CHARTER PARTY, AND UPON THE FACTS OF THIS DETENTION AT CALLAO, THE WAGES AND PROVISIONS WERE NOT GENERAL AVERAGE, FOR THE REASON THAT IN THIS CASE IT WAS EXPRESSLY STIPULATED IN THE CHARTER PARTY THAT THE SHIP SHOULD BE MADE SEAWORTHY BEFORE HER DEPARTURE FROM CALLAO.

The charter party contained the following agreement on the part of the ship: "The ship shall, after completing her cargo, be inspected at the port of clearance, at her own expense, by a person appointed by the charterers and by government surveyors, in order to ascertain again her sound and seaworthy condition" (fol. 16). The prior provision of the charter party here referred to is as follows: "That the said vessel, being tight, staunch and strong, well conditioned, and in every way fitted for the voyage, shall, with all convenient dispatch, be inspected by the Peruvian Government surveyors, and if not reported in such order and condition as aforesaid, the necessary repairs shall be made at ship's expense" (fol. 10).

The two provisions are to be read together, and they clearly import that the ship was to be made seaworthy before leaving Callao, at her own expense.

On the way to Callao she met with an injury. She was not wrecked. It was not such an injury as could be treated as a shipwreck, discharging her from the contract under the exception against "the perils of the seas." She was bound to go on and have the injury repaired, and complete the voyage. The charterers had no right to demand the cargo because of the injury. They were bound to wait till the ship was repaired and could proceed on her voyage.

There was no peril *threatening this voyage or adventure*, except the peril of the ship's refusal or neglect to make herself seaworthy. No peril except that of the ship's violating the charter party. Why then should the cargo be

called on to help make the repairs, which not only inured solely to the benefit of the ship, and enabled her to earn her freight, but which the ship had expressly contracted to make before departing for Callao in consideration of the charterers' promise to pay freight?

That the exception of "the perils of the sea," customarily used in charters and bills of lading, does not relieve the ship from its obligation to repair and continue the voyage was expressly determined in *Moss* v. *Smith*, 9 C. B. 94.

Cresswell, J. "The shipowner's contract to carry the cargo would be absolute but for the exception introduced into the bill of lading—unless prevented by perils of the sea. Now when is the shipowner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing her voyage when she is merely damaged to an extent which renders some repairs necessary; if that were so, any the most inconsiderable damage, such as the loss of her rudder, without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading. But if a ship sustains so much sea damage that she cannot be repaired so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract" (pp. 105–106.) And Wilde, Ch. J. (p. 108) explains that the shipowner is only required to repair where the ship when repaired with her freight will be worth as much as the cost of repairs. If not worth that she may be treated as wrecked, totally lost.

See also *Benson* v. *Chapman*, 2 Ho. of Ld's Cases, 696, 720.

But independently of this rule, casting on the shipowner the duty of repairing if it is practicable, we have here an express understanding on his part that the ship shall be seaworthy, and made so at the owner's expense, not only as is usually stipulated at the commencement of the voyage, but at her departure from Callao.

In a case where it was agreed in the charter party that the ship should be kept strong and tight at the owner's expense during the whole voyage, a claim for general average expenses at a port of refuge to repair the ship, was denied on the ground that by the charter it was agreed on the part of the shipowner to keep the ship seaworthy.

Jackson v. *Charnock*, 8 T. R. 509.

As to Capt. Patterson's Bill.

There are two questions as to the allowance of this item:

1*st. Can it be allowed under the proof of custom found by the court?*

2*d. If allowable by the custom, is it allowable under this charter party and the circumstances of this case?*

FOURTH POINT.

THE CUSTOM PROVED IS NOT SUFFICIENT TO JUSTIFY THE ALLOWANCE OF THE EXPENSES OF THE SPECIAL AGENT SENT OUT BY THE OWNER OF THE SHIP.

1st. The custom found by the court is a general custom to allow in general average the expenses of a special agent sent out by the owner of the ship on hearing of a disaster to her (fols. 26–28). This custom is not shown to extend to the case of an agent sent to the port of distress, when that is the port at which the owner of the cargo, or his agent, resides (fol. 28).

In this case the owner of the cargo and his agent were both at the port of distress. The owner of the cargo was at Lima, and the agent at Callao, the port of Lima, and close by it (fol. 27).

The court will take judicial cognizance of the geographical position of these two places.

The owner of the ship knew this when he sent the agent out (fol. 27).

There was, therefore, no custom controlling this case.

2d. The custom proved, to bind the owner of the cargo, must be *reasonable and lawful*. The bond is limited to lawful customs (fol. 10).

The custom is neither reasonable nor lawful, as applied to a case where the owner of the cargo resides or has his agent at the port of distress.

The custom may be supposed to have had its origin in the fact that, though a shipmaster is capable generally of acting for and as the agent of all concerned, yet, in fact, in a great many cases he is not a person in case of emergency to act with entire discretion and good judgment. It is reasonable, therefore, and likely to be for the good of all concerned, that, when the ship is in distress in a remote and foreign port where neither ship nor cargo has an authorized representative, the shipowner should send out a proper and experienced person to advise with and assist the master.

But this reason wholly fails where the owner of the cargo resides, or has an agent to transact his business, at the port of distress. He is the party most interested in the success of the voyage, and he is to be presumed competent to give the master all the advice and assistance he needs. Especially is this the case where he is the charterer of the ship, having substantially the direction and control of her for the voyage, the owner merely furnishing, manning and victualing the ship.

And, moreover, in such a case the owner of the cargo being on the spot, he is at least competent to look out for his own interest and represent the cargo; and if the shipowner send out an agent, it is not in such a case for the mutual benefit, but for his own solely, since the cargo needs no representative.

For these reasons it is insisted that the custom should not be extended to this exceptional case, especially where the evidence was as found, that so far as appeared on the trial, it has never been so extended. And the learned judge below thought the allowance would not be right if it were not for the custom (Opinion, fol. 49).

FIFTH POINT.

BUT, HOWEVER THE CUSTOM MAY BE, THIS WAS AN IMPROPER ALLOWANCE IN THIS CASE, BECAUSE UNDER THE CHARTER PARTY IT WAS THE OBVIOUS INTENTION OF THE PARTIES THAT THE SHIP, EVEN IN CASE OF DISASTER, SHOULD AT ALL STAGES OF THE VOYAGE BE CONSIGNED TO, AND ITS ENTIRE BUSINESS TRANSACTED BY THE CHARTERERS, AND NOT BY THE SHIP OWNER.

The charter provides as follows (fol. 16): "The ship to be consigned to charterer's agents at New York, or their agents at the port of discharge, who will charge usual commissions. And if, by any unforeseen event, the vessel should enter any port or ports on the Pacific or Atlantic, or in any of its islands, to repair damages, the captain shall consign her to the agent or agents of the Compania Consignataria, &c." [the charterers] "(paying usual commissions), who shall perform all business belonging to the ship and cargo." Then certain ports are enumerated, and the name of the agent at one port is given, and it is added, "and in other ports the parties authorized by the said company, or the agents in the ports above mentioned."

The case provided for is the case of a disaster at sea necessitating resort to a port of refuge, and in such case "all the business belonging to the ship and cargo" clearly includes any advice or assistance the captain may require.

The very object seems to have been to protect the

charterers who had competent agents everywhere from the additional expense and the conflicting authority of an agent sent out on behalf of the ship.

It is true, Callao is not mentioned in this clause, and the ship did not literally enter Callao by reason of the collision, but upon a consideration of the other parts of the charter party and the paper signed by the master at the time of its execution, the intent is clear that at Callao the ship was to be consigned to the charterers, and their agent was to do the business of the ship, and therefore there was no need so specify the port of clearance in this clause.

The ship was to sail from the islands to the United States direct, or to Callao for final clearance, as the charterers should direct (Charter, fol. 11). She was ordered to Callao for clearance (fol. 19).

If she had been ordered directly to the United States, and had put into Callao as a port of refuge, there is no question that Callao would have been within the clause in question.

No conceivable reason can be given for supposing that at Callao alone, where the business of the charterers was chiefly done, the parties intended that the ship should not be consigned to, and her business, in case of disaster, transacted by the charterer's agent.

The contrary is clearly implied from the fact that she was to go there for her clearance (fol. 11); that she was to be inspected there and found seaworthy by a person appointed by the charterers (fol. 16), and by the stipulation in the paper signed by the master, agreeing to *pay the charterer's agent at Callao* $150 for clearing the ship to the island, and *when outward bound* (fols. 19, 28). This last provision shows conclusively that she was to be consigned to the charterers there; otherwise they would not clear her.

In view of the further fact, that the value of the cargo was nearly four times that of the ship, and a half more than that of ship and freight together (fol. 24), the reasonableness of this requirement is obvious. And it would require an express provision of the charter party to war-

rant the conclusion, as matter of construction, that at Callao the charterer's agent was not to transact all her business.

SIXTH POINT.

The judgment should be modified and reduced by striking out the item of $2,674 26 allowed for wages and provisions, with interest therson $508 55, and also the item of $1,073 52 allowed for Capt. Patterson's expenses and interests thereon, $204 15, with costs in this court to the plaintiffs in error.

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